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THE REFORM OF THE FRENCH ADMINISTRATIVE COURTS

Introduction

In 1953 the pattern of French administrative courts was radically altered. In this article it is proposed to consider the causes of this reform, the nature of the changes, and the results that have already become apparent.* The reform is barely five years old, so that it may appear rash to speculate on its ultimate outcome, but a comprehensive account of the reform should prove of timely interest to British administrative lawyers, if only because the existing English writings upon the *droit administratif* no longer accurately represent what they purport to describe.[1] At a time when France and its institutions are passing through a critical phase it is important to be correctly informed about an institution which has helped France to weather many such storms in the past and whose stabilising influence will be no less valuable in the present turmoil.[2]

* I am indebted to Professor C. J. Hamson and M. Guy Braibant, commissaire du gouvernement at the Conseil d'Etat, for reading the draft of this article and making valuable suggestions.

1 The best description of the Conseil d'Etat in English is to be found in Hamson, *Executive Discretion and Judicial Control* (Stevens, 1954); a wider survey of French administrative law in general is Schwartz, *French Administrative Law and the Common Law World* (New York Univ. Press, 1954). The leading French treatises are de Laubadère, *Traité Elémentaire de Droit Administratif* (2nd ed., 1957) and Waline, *Droit Administratif* (7th ed., 1957); a useful short account of the French administrative courts is Letourneur et Meric, *Conseil d'Etat et Juridictions Administratives* (Librairie Armand Colin, 1955).

2 It is noteworthy that the spate of reforms hurriedly passed by the government of General de Gaulle at the end of 1958 have not affected the administrative courts. Rather, certain features of the administrative system have been copied and applied to the magistrates and courts *de l'ordre judiciaire*: *e.g.*, the creation of a new junior grade of magistrates to be known as *Auditeurs de justice* (*cf. les Auditeurs auprès du Conseil d'Etat*); the formation of a *Centre national d'études judiciaires* (*cf. l'Ecole nationale d'administration*—footnote 24 below); the introduction of *une mission d'inspection* (*cf. la mission d'inspection* of the Conseil d'Etat—footnote 35 below); and—a significant development—

I. CAUSES OF THE REFORM

Students of the Conseil d'Etat have described how by the end of the nineteenth century it had developed into a true court endowed with a great prestige. Its success in gaining the confidence of a public instinctively distrustful of lawyers was a notable achievement, which has been vividly described elsewhere. This success, however, was to prove its undoing.

Until 1945 the Conseil d'Etat had been able to cope with the growing burden of litigation which the ever-widening activity of the Administration brought in its train. It had achieved this by progressively increasing the number of its organs of judgment. The Conseil d'Etat, or more precisely the *Section du Contentieux* of the Conseil d'Etat, was divided into a number of subsections which, sitting either singly or in pairs, might decide cases in the name of the Conseil d'Etat.[3] By 1945 these subsections numbered eight.[4]

After the Liberation there was a steep rise in the number of plaints lodged with the Conseil d'Etat. Many stemmed from the process of *épuration* designed to rid the Administration of those officials who had collaborated with the enemy during the occupation: the *fonctionnaire* who rightly or wrongly believed himself aggrieved challenged his dismissal[5] before the Conseil d'Etat. Many, too, were the result of the increasing part played by the Administration in regulating the social and economic life of the nation.

The Conseil d'Etat gradually fell more and more behind in its race to keep abreast with this spate of litigation. Whilst some 6,000 plaints were lodged in its registry in an average post-war year, it only judged some 4,500, and this despite the most prodigious efforts by every member of the *Section du Contentieux* to increase the output of decisions. As a result of this disparity between input and output, the pace of administrative justice had become so slow as to amount, in some instances, to a virtual denial of justice. The citizen began to doubt the value of challenging an administrative act which might not be annulled for illegality until twelve years after.[6] Moreover, by the end of 1953, the Conseil d'Etat was faced with a backlog of 26,000 cases awaiting judgment, a backlog which, as matters then stood, was likely never to be absorbed, but rather to grow still larger.[7]

a new emphasis in civil litigation upon *la procédure écrite* directed by the judge at the expense of *la discussion orale* of counsel. For fuller details of these reforms, see Charpentier, " La Réforme Judiciaire " (*Revue de Paris*, 1959, 3) and Blanc, *La Nouvelle Procédure Civile* (Paris, 1959).

3 See Hamson, *op. cit.*, p. 98s.; also Hamson, " Le Conseil d'Etat statuant au Contentieux " (1952) 68 L.Q.R. 60.

4 A ninth was added by the Decree of December 12, 1950, and a tenth and eleventh by the Law of August 4, 1956.

5 Or other sanction, *e.g.*, *rétrogradation*, *mutation*, *blâme*.

6 In an extreme case; the average before the reform was 4 to 5 years.

7 These figures are taken from Gazier, " De Quelques Perspectives sur la récente réforme du Contentieux Administratif " (*Revue du Droit Public*, 1954, 669).

The situation called for a drastic remedy. This was found in a complete reversal of the pattern of administrative jurisdiction. In brief, the Conseil d'Etat lost the greater part of its jurisdiction at first instance: the usual court of first instance was to become the Conseil de Préfecture. These local courts, of which there were twenty-six in Metropolitan France, were to enjoy an improved status more in keeping with the dignity of their new role. They were also to receive a new name, that of Tribunaux Administratifs. By this deconcentration of administrative jurisdiction it was hoped to relieve the pressure upon the Conseil d'Etat without impairing the quality of justice to which the citizen had become accustomed in his litigation against the State.

Before describing these changes more fully, it is necessary to say something of the history of the regional Conseils de Préfecture, on which a new and heavy burden has now been placed. Very little has been written about these courts in English, and in French they were only the subject of a single treatise until the reform of 1953 attracted attention to them.[8] Yet even before that date they could not be neglected in any complete picture of administrative jurisdiction in France.

Conseils de Préfecture, 1799–1953

It is only a half-truth to say that modern French institutions have their birth in the Revolution. Just as the Conseil d'Etat was foreshadowed in the King's Council, so the Prefects—in whom Napoleon centred the administration of the *département*—were the successors of the Intendants of the *ancien régime*. These royal officers combined powers of local administration in matters of *police* and finance with various judicial functions, especially in administrative matters, where they had exclusive jurisdiction. Under the Directorate, all these attributes passed to the Directories of the departments, and thence, under the Consulate, to the Prefects.[9]

The Constitution of the Consulate in 1799 created the Conseil d'Etat as an advisory body to the Head of State, particularly on the drafting and construction of legislation. It was not long, however, before the Conseil d'Etat began to act also as a judicial organ, basing its jurisdiction on the provision in article 53 of the Constitution that "it should resolve disputes arising in administrative matters."[10] In the same year, the Law of 28 *pluviôse* created,

[8] In English, see Schwartz, *op. cit.*, pp. 42–44; in French, see de Font-Réaulx, Durnerin et Marizis, *Les Conseils de Préfecture* (Sirey, 1937); treatises since the reform include Bonnet et Palvadeau, *Les Nouveaux Tribunaux Administratifs* (Paris, 1954) and Choublier et Compain, *Les Nouveaux Tribunaux Administratifs* (Paris, 1954).

[9] An interesting recent study of the office of Prefect is Chapman, *The Prefect and Provincial France* (London, 1955).

[10] A Commission du Contentieux was set up within the Conseil in 1806; but decisions of this Commission continued to be framed in the form of advice to the Head of State until 1872 (save for a short period after the revolution of 1848): the analogy to the Judicial Committee of the Privy Council is obvious.

in each department, a Conseil de Préfecture to fulfil similar advisory and judicial functions in relation to the Prefect. Certain decisions of the Prefect had to be made upon the advice of the Conseil de Préfecture; otherwise, he might consult it as he thought fit. Article 4 of the Law specified the matters in which the Conseil de Préfecture should exercise jurisdiction; these included appeals against direct taxation, claims against the administration in connection with public works, and infringements of public rights of way.[11]

From the first, the Conseils de Préfecture asserted themselves as true courts although they had no precise rules of procedure and their subordination to the local administration was indicated by the fact that the Prefect presided and had a casting vote in the event of an equal division among the members of the court.

The judicial function of the Conseil de Préfecture was reaffirmed by article 4 of the Law of 29 *floréal*, 1801, as well as by numerous decisions of the Conseil d'Etat. Development, however, was less marked than with the Conseil d'Etat, because of the limited importance of the matters submitted to their jurisdiction. The next step forward was not until the reforms of 1862–65.[12] Each Conseil de Préfecture was then provided with a permanent Registrar (*Secrétaire-Greffier*) to receive plaints and direct the written procedure: previously this had been done in the offices of the Préfecture. The written procedure was to culminate in a hearing which must be in public and at which the complainant or his counsel might plead; at this hearing, the Registrar would act as *ministère public* in a manner similar to that of the *Commissaire du Gouvernement* in the Conseil d'Etat. The Conseil de Préfecture was obliged to publish a reasoned decision.[13] At the same time the separation of the Conseil de Préfecture from the administration proper was improved by the creation of an office of vice-president to act as the normal president of the court in place of the Prefect; the vice-president was nominated annually from amongst the members of the court. The qualifications for members of the court were made more stringent: they must either possess a law degree or have had ten years' service in the administration or the judiciary. Finally, some general principles of procedure were laid down.

The next reform occurred under the Law of July 22, 1889.[14] Previously, such gaps in procedure as were left by the Decree of

[11] Whereas the Conseil d'Etat only exercised a *justice déléguée* after 1872, jurisdiction was delegated to the Conseils de Préfecture from the first; for this distinction between *justice déléguée* and *justice retenue*, see Hamson, *op. cit.*, p. 82; Waline, *op. cit.*, pp. 29–31.

[12] *Viz.* Decree of December 30, 1862; Law of June 21, 1865; Decree of July 12, 1865.

[13] Until the reform of 1953 the decision was promulgated as an *arrêté*, a form used for administrative regulations generally (see, *e.g.*, *arrêté* of September 30, 1953, discussed below, pp. 365–366).

[14] Amplified by the *Règlement d'administration publique* of January 18, 1890.

1865 were filled—as had been the practice before 1865—by recourse to the Decree of July 22, 1806, governing the procedure before the Conseil d'Etat, or, where this was silent, by analogy to certain rules of the Code of Civil Procedure. By these means the Conseil d'Etat, in hearing appeals from the Conseils de Préfecture, had developed a considerable case-law relating to the procedure applicable in the lower courts. This case-law was now confirmed by the Law of 1889, and the functioning of the Conseils de Préfecture improved by a comprehensive code of procedure.

But much still remained open to criticism. The Prefect retained the right to preside at the sittings of the Conseil de Préfecture of his department; and a few Prefects did assert this right up to 1926. The presence of the *Secrétaire-Greffier* as *Commissaire du Gouvernement* was an inadequate arrangement when compared with the independence and prestige of the *Commissaires* in the Conseil d'Etat, in which court this important function was performed by nominees drawn usually from the ranks of the *Maîtres des requêtes*. The judges of the Conseils de Préfecture were poorly paid and enjoyed an equivocal position of uneasy independence. The method of their recruitment was ill-suited to maintaining high standards of energy and ability, and the absence of any prospects of promotion to higher office discouraged the better kinds of candidate. Moreover, their limited jurisdiction over an ill-assorted group of matters meant that in the less populous departments they were often inadequately occupied.

After the War of 1914–18 various suggestions for the reform of the Conseils de Préfecture were mooted. These included one for their total suppression in the provinces and the transfer of their jurisdiction to the ordinary civil courts; but in administrative cases the civil courts were to follow the procedure of the Law of 1889—a striking testimony to the superior virtue of the written procedure, as against that of the Code of Civil Procedure—and appeal should lie to the Conseil d'Etat. Eventually, in 1926, a less radical reform was effected. By the Decree-Law of September 6, 1926, the existing eighty-six Conseils de Préfecture of the departments were replaced by twenty-two inter-departmental Conseils de Préfecture, the jurisdiction of each extending over several departments. Provision was made for a member of the Conseil de Préfecture to be detached in order to sit alone to judge cases at the capital of those departments which were not the seat of one of the new inter-departmental Conseils. The changes of 1926 made possible a reduction in membership of the Conseils de Préfecture from 258 to 110, thereby achieving a substantial economy whilst cutting out a certain amount of redundancy.

In addition to this territorial rearrangement, the changes of 1926 improved the independence of the Conseils de Préfecture. The Prefects ceased to be the titular presidents of the Conseils; instead,

each Conseil was given a president who was to be a full-time member of the court with an improved status and higher salary. The *Secrétaire-Greffier* was relieved of his duties as *Commissaire du Gouvernement*, which were to be undertaken in future by a member of the court nominated to this function.

The status of members of the Conseils de Préfecture was improved by grouping them into a separate *corps* of civil servants recruited in part by a special *concours*. This brought increases in salary and greater security of tenure in their office. Certain changes were also made in procedure, organisation and jurisdiction.

An important exception to the regrouping of the Conseils de Préfecture was the Conseil de Préfecture de la Seine, the area of which included Paris: this Conseil was not included in the regrouping, for the dense population of the capital and the concentration there of government departments, local authorities and other administrative bodies had always brought it a much heavier burden of litigation than the other Conseils. Already, in a Decree of March 17, 1863, the Conseil de Préfecture de la Seine had been given an independent president and divided into two sections, each with a *président de section* and a *Commissaire du Gouvernement*. Accordingly, special provision had to be made for this Conseil in the general reforms of 1926: this was done by the Decree-law of December 3, 1926.

Confidence in the new Conseils was marked in 1934 when the events of 1953 were foreshadowed, to a slight extent, by the Conseil d'Etat releasing to the Conseils de Préfecture certain classes of case which had hitherto fallen within its exclusive jurisdiction. A further extension of jurisdiction took place in 1938. The details of the changes in 1934 and 1938 are given below.

No further changes in the Conseils de Préfecture were made until the reform of 1953. It will help to an understanding of this reform if we enumerate the classes of cases submitted to their jurisdiction immediately prior to the reform.

Jurisdiction of Conseils de Préfecture

We have seen that the original jurisdiction covered, essentially, three matters: direct taxation, public works, and public rights of way.

Direct taxation has remained an important preserve of the Conseils de Préfecture. For French direct taxes are more numerous than the British and give rise to even more litigation. Public works have similarly remained in the jurisdiction of the Conseils. Public rights of way (*la grande voirie*) comprehend all rights of way, both on land and water. In 1926, territorial rights of way were removed into the jurisdiction of the civil courts: only rights over waterways and harbours remain within the jurisdiction of the Conseils de Préfecture.[15]

[15] Decree-Law of December 28, 1926.

To these original heads of jurisdiction, the reform of 1934 added: actions for damages against local authorities, disputes of a local government officer with his local authority concerning his status, claims in connection with contracts made with a local authority, and disputes over elections to the Conseil Général of the *département*. Finally, in 1938, their jurisdiction was extended to contracts of the State, a local authority, or any other administrative authority in relation to the occupation of public property (*domaine public*).

II. THE CHANGES OF 1953

Parliamentary History of the Reform

In 1953, the whole pattern of administrative jurisdiction was transformed by the most important reform of the administrative order of courts since their creation in 1799.[16] The parliamentary history of the measures effecting the reform is typical of the political career of most proposals for change under the Fourth Republic. By a Law of July 11, 1953,[17] the Government of M. René Mayer was empowered to effect by decree a reform of administrative justice before the following October. This followed upon an attempt by the Government of M. Pinay to introduce a Bill containing such a reform, the debate of which had not progressed beyond the first few articles when the Pinay Government fell. Although the eventual reform was to be closely modelled upon the provisions of this Bill, which embodied the proposals of the National Assembly's Commission on Justice and Legislation under the presidency of M. Wasmer, French writers have pointed out the paradox of the reform of the administrative courts, in themselves a bulwark of parliamentary democracy, being carried out by the unparliamentary and authoritarian method of governmental decree. By a striking coincidence, the previous reforms of 1926, 1934, 1938 and 1945 were all marked by the same paradox.[18]

New Pattern of Jurisdiction

The object of the reform was to relieve the crushing burden upon the Conseil d'Etat. To this end a completely different

[16] Valuable accounts of the reform include: de Font-Réaulx (Recueil Sirey, 1953, L. 1436; reprinted separately as *La Réforme du Contentieux Administratif*, Sirey, 1954); Cassin, "L'évolution récente des juridictions administratives en France" (*Revue internationale des Sciences Administratives*, 1953, 833); Letourneur, "La réforme des compétences au sein de la juridiction administrative" (*Gazette du Palais*, 1953, Doctrine, 62–64; 77–80); Gazier, "La réforme du contentieux administratif" (*Juris-Classeur Périodique*, 1953, I, 1134); Rivero, "La réforme du contentieux administratif" (*Revue du Droit Public*, 1953, 926); de Laubadère, "La réforme du contentieux administratif" (*Actualité Juridique*, 1953, 173; 1953, 385; 1954, 13); Bonneau, "Les nouveaux Tribunaux Administratifs" (*Revue Pratique du Droit Administratif*, 1954, *I*, 7; *2*, 30).

[17] Art. 7, para. III.

[18] "Tout se passe comme si, malgré les gages qu'elle a prodigués à la démocratie libérale, la juridiction administrative se ressentait toujours de ses origines autoritaires" (Gazier, *op. cit.*, J.C.P., 1953, I, 1134, 3).

principle was to be applied to the jurisdiction of the Conseils de Préfecture. Hitherto, they had constituted what French law termed a *juridiction d'exception*, in contrast to the Conseil d'Etat —a *juridiction de droit commun*. In other words, the Conseil d'Etat had competence in the absence of some exceptional provision conferring competence upon the regional courts. After 1953, however, it is the Conseil d'Etat which becomes, so far as jurisdiction at first instance is concerned, the *juridiction d'exception*. In the absence of a contrary text, the Conseils de Préfecture, under their new name of Tribunaux Administratifs, will be the *juridiction de droit commun*.

It should be noted that no change is made in the competence of the Conseil d'Etat as court of appeal or court of cassation: it continues to exercise appellate jurisdiction over the new Tribunaux Administratifs, as it did over the old Conseils de Préfecture [19]; likewise, its jurisdiction in cassation over other subordinate administrative jurisdictions remains unaltered. It may, therefore, become seized of a case in any one of three ways: at first (and last) instance in one of the special cases withdrawn from the competence of the Tribunaux Administratifs; or by way of appeal from the Tribunaux Administratifs; or by way of cassation from some other administrative jurisdiction.[20]

It is no longer apt to enumerate the categories of case in which jurisdiction is conferred upon the Tribunaux Administratifs. Rather, one must state the exceptions to the general principle whereby they have become the usual court of first instance in administrative cases. These exceptions are categories of cases where, for various reasons, jurisdiction at first instance has been retained by the Conseil d'Etat. They comprise:

(1) *Ultra vires* proceedings against a decree, whether the decree be of a general application or appertain to an individual.[21]

(2) Disputes concerning the individual situation of any public servant who is nominated by decree.[22]

[19] And over the *Conseils du contentieux administratif* in French territories overseas (see below).

[20] There are a number of these specialised administrative jurisdictions. The oldest is the *Cour des Comptes*, but most are of recent origin, such as the governing bodies for the various professions. Most social insurance tribunals and the bodies controlling the legal profession are not regarded as administrative but are subordinated to the *Cour de Cassation* as the supreme civil court. For a complete list of the administrative (as distinct from the civil) jurisdictions, see Gazier et Long, *Jurisprudence du Conseil d'Etat en 1954* (Paris, 1955), pp. 107–109, where over 40 jurisdictions are listed.

[21] A " décret " is an administrative order having force of law and emanating either from the President of the Republic or from the President of the Council of Ministers; the décret may either be of general application (*réglementaire*) or relate to an individual, as, for example, a décret sanctioning a change of name (expressly stated to be included in (1) above by the Règlement d'administration publique of November 28, 1953) or a décret nominating a *fonctionnaire* (see (2) above). See generally Sieghart, *Government by Decree* (Stevens, 1950).

[22] Besides *les hauts fonctionnaires*, nomination by decree applies also to the magistracy (including the *parquet*), serving officers in the Armed Forces, and

(3) Proceedings to challenge administrative acts, the field of application of which extends beyond the area of any single Tribunal Administratif.

(4) Disputes over elections to the Algerian Assembly and proceedings against the deliberations of that Assembly.

(5) Litigation, administrative in character and arising outside the territories subject to the jurisdiction of the Tribunaux Administratifs or the *Conseils du contentieux administratif*.

Category (5) is necessary because the reform of 1953 has left unaltered the jurisdiction of these Conseils, which have a similar role in French territories overseas to that of the Tribunaux Administratifs. They only have competence in *contentieux local*, as distinct from *contentieux de l'Etat français*, and only then in *recours de pleine juridiction*: *le contentieux de l'Etat français* and *recours pour excès de pouvoir du contentieux local* are reserved to the Conseil d'Etat.

Category (3) is reserved to the Conseil d'Etat in order to prevent any conflict of jurisdiction between the various Tribunaux Administratifs who might claim competence in the particular matter. The other categories are withdrawn from the competence of the Tribunaux Administratifs by reason of the importance or delicacy of their subject-matter.

The problems of the jurisdiction of the Tribunaux Administratifs *inter se* may be postponed for consideration later.

New Status of Tribunaux Administratifs

As part of the reform the judiciary of the Tribunaux Administratifs were endowed with a new and enhanced status. The relevant enactments were the *Règlement d'administration publique* (*décret* 53–936), the Decree (*décret* 53–937) and the *Arrêté*, all of September 30, 1953. As a result of these enactments the judges in the new courts acquired improved conditions of service. In particular, their salaries were raised to a level more in keeping with their new and important functions, and equivalent to the salaries of the judges in the civil *Tribunaux de première instance*.[23] Moreover, although they remained under the responsibility of the Minister of the Interior, their appointment now required the counter-signature of the Minister of Justice. A new avenue for advancement was opened by the provision that one post of Counsellor and two of *Maître des requêtes* should be reserved in the Conseil d'Etat for recruitment from the Tribunaux Administratifs. No provision, however, was made for any increase in the number of judges to cope with the expected flood of litigation into

senior academic posts: for a complete list, see Gazier et Long, *op. cit.*, pp. 100–107.

[23] Now renamed *Tribunaux de grande instance* by the reforms of December 1958, in contrast with the *Tribunaux d'instance* which have replaced the former *Justices de paix*.

the new courts; only in the three Tribunaux Administratifs of the Algerian departments of Algiers, Constantine and Oran was any change made in their judicial staff: to each of these Tribunaux was added a new post of *Commissaire du Gouvernement*, this function having previously been fulfilled by the *Secrétaire-Greffier*. As will be discussed below, the need for extra judges in the Tribunal Administratif of Paris had later to be met by special provision.

The enactments also introduced a strict system of recruitment to the new courts. The lowest grade of judges, known as Councillors (Second Class), were to be drawn exclusively from the National School of Administration.[24] The higher grades of Councillor (First Class), Councillor of the Tribunal Administratif of Paris, and President were to be recruited, as to three quarters from the National School and as to the remaining quarter *à tour exterieur* from the active administration. Recruits from the administration must be *fonctionnaires* of a certain level and *licenciés en droit*.

III. Results of the Reform

In estimating the results of the reform one must consider its effects, first, upon the Conseil d'Etat, and secondly, upon the Tribunaux Administratifs.

(1) *Effects upon the Conseil d'Etat*

Undoubtedly, the reform has succeeded in its immediate object of relieving the crushing burden which threatened to stultify the working of the Conseil d'Etat. An immediate consequence of the reform was to reduce the backlog of cases awaiting the attention of the Conseil d'Etat from around 26,000 to 17,000.[25]

This was done by the transfer to the new courts at the end of 1953 of 8,500 *dossiers* then in the Registry of the Conseil d'Etat, but not yet in readiness for judgment. In order to decide which *dossiers* were to be transferred and to which courts, the *Section du Contentieux* had to apply the *Règlement d'administration publique* of November 28, 1953. This *préjurisprudence*, as it has been called,[26] was the product of some of the ablest minds in the

[24] *L'Ecole Nationale d'Administration* (L'E.N.A.) was set up in 1945 for the training of senior administrators. Entrance to the School is by competitive examinations, one for university graduates, the other for existing members of the administration. Students undergo an intensive three-year course, with a stiff examination at the end of the second year according to which they are graded for the available posts in the administration. For further details, see Debré " Le Conseil d'Etat et l'E.N.A.", *Livre Jubilaire* (Sirey, 1952), p. 473; Waline, *op. cit.*, pp. 748–751; Ribas, " L'E.N.A. et le recrutement des magistrats administratifs " (*Etudes et Documents*, 1955, p. 49).

[25] See Piernet, " Les premiers lendemains de la réforme du Contentieux administratif à l'echelon régional " (Actualité Juridique, 1956, I, 9).

[26] Braibant, " La compétence des Tribunaux Administratifs régionaux dans la jurisprudence du Conseil d'Etat " (Actualité Juridique, 1955, I, 93).

Section du Contentieux: in the result, few of the transfers have been successfully challenged as having been improperly withdrawn from the Conseil d'Etat or allocated to the wrong Tribunal Administratif.

Moreover, the new rules of jurisdiction meant that the likely input of new cases into the Conseil d'Etat would fall from its previous level of 5,500–6,000 a year to, perhaps, 3,000–3,500 a year. As the Conseil d'Etat has the ability to judge annually upward of 4,000 cases,[27] it will be seen that it should be possible for the continuing backlog to be gradually overhauled—perhaps as early as 1960—especially as the Conseil d'Etat requires to have a normal stock in hand of some 4,000–5,000 cases awaiting or undergoing *instruction* in order that all parts of the machinery shall be kept fully occupied with work. It is also likely that the backlog is swollen by many cases that will never be pursued to actual trial: the lodging of a plaint by the citizen with a grievance is often only a last desperate attempt to persuade the Administration to retrace its steps—and the gesture once made, the citizen frequently has no stomach to press the case further.

One big question-mark overhangs this optimistic analysis of statistics. This is the number of appeals that are likely from the decisions at first instance of the Tribunaux Administratifs. Some observers feared that, while the reform might bring short-term relief to the Conseil d'Etat, in the long run the Conseil d'Etat would be very little better off. They argued that a good proportion of the cases dealt with at first instance by the Tribunaux Administratifs would be the subject of appeals, so that the Conseil d'Etat would get back in its appellate capacity much of what it had shed at first instance. Even of the cases redistributed from the backlog many would ultimately, and after the lapse of several years, come back before the Conseil d'Etat by way of appeal.

This gloomy prognosis has not been fulfilled. Contrary to expectations, the number of appeals from the decisions of the Tribunaux Administratifs has remained very low—not more than 15 per cent.[28] And of the cases that are appealed, only one appeal in three is successful. Thus, 95 per cent. of the decisions at first instance remain intact.

In particular, some feared that the Administration would circumvent the reform by a policy of systematic appeal against every unfavourable decision at first instance. In fact, it has not done so, although the reasons for this moderation remain obscure. Some think it is out of respect for the new order of regional courts in which, generally speaking, the Administration is satisfied with

[27] See *Etudes et Documents*, 1957, p. 17 and pp. 89–90, for recent figures.

[28] Gazier, *op. cit.* (R.D.P., 1954), p. 669, gave an estimate of one appeal in four; Weill in *Etudes et Documents*, 1957 ("Les premiers résultats de la réforme du contentieux administratif," pp. 131–139) supports the estimate in the text.

the quality of justice there encountered. Others suggest that it is still too early to dismiss the spectre of systematic appeals. They argue that the central Ministries were ill-adapted to cope with the sudden decentralisation of administrative justice: they lacked experienced local officers to represent their Ministry before the local Tribunaux Administratifs; and *dossiers* had to go to and fro between Paris and province, thereby adding to the burdens of an already overloaded bureaucracy. In the face of this extra work, the litigation departments in the various Ministries were not anxious to add still further to their burden by lodging appeals merely for the sake of embarrassing the new order of local courts. This may not, however, continue to be the attitude once the Ministries have redeployed their forces and recruited staff; then will be the time to see whether the Administration is prepared to bow before the new Tribunaux Administratifs with the same deference as it has traditionally displayed towards the decisions of the Conseil d'Etat. If the Administration then refrains from systematic appeals it will be a testimony to the enhanced prestige of the new local courts.

But whatever the future may bring, today, some five years from the reform coming into effect, there is still no sign that appeals are being lodged unreasonably by the Administration, and the fears on this account are now being increasingly discounted.[29]

The reform can be expected to have other effects upon the Conseil d'Etat besides reducing its burden of work. The very character of its work will be changed. For its predominant function will become that of a jurisdiction *en appel* or *en cassation*. The loss of its dominant role as court of first (and last) instance must affect the nature of its activities in the future.[30] As the general jurisdiction at first and last instance in administrative cases, it could cloak its decisions in a concise language which might be Ciceronian in syntax and elegance, but was of a Delphic obscurity unless interpreted by reference to the conclusions (not always published) of the *Commissaire du Gouvernement*.

This reluctance of the Conseil d'Etat to show its hand, which stems from the same judicial instinct as makes the English judge reluctant to lay down a wider rule than is demanded by the case before him, is likely to impede the success of the reform.[31] What is permissible, even laudable, in a court of first instance—anxious to leave ground for future manoeuvre—may be positively harmful in a court whose mission is the correction and guidance of lower

[29] Weill, *op. cit.*, p. 136.

[30] See, on its future as an appellate court, Rivero, "Le Conseil d'Etat—cour régulatrice" (Dalloz, 1954, Chron. 158) and Feuer, "Contribution à une théorie de l'appel dans la procédure administrative" (R.D.P., 1958, 19); and on its function in cassation, Jacquemart, *Le Conseil d'Etat—Juge de Cassation* (Lille, 1956).

[31] Rivero, *op. cit.*, p. 158; Latournerie, "Les methodes juridictionelles du Conseil d'Etat" (*Livre Jubilaire*), at pp. 220–221.

courts made subject to it by way of appeal or cassation. Lower courts expect to be told where they have erred, so that they may mend their ways for the future; and they are entitled to be told in clear and unequivocal terms.[32]

There are indications that the Conseil d'Etat is conscious of its new responsibility. There is a tendency for its decisions to become more explicit and longer.[33] Nevertheless, the traditional shape of the jurisprudence of the Conseil d'Etat[34] prevents the process of reasoning on which a decision is based from being demonstrated with that clarity which is possible (although not always attained) in an English court. Whilst the conclusions of the *Commissaire du Gouvernement* usually signpost the route which the reasoning of the court has followed, there is no certainty that the decision urged by the *Commissaire* has not been reached by some different path which commended itself to the members of the courts; nor are the conclusions of the *Commissaire* always published.

The Conseil d'Etat has recognised the deficiencies of its own official utterances by establishing an information service for the benefit not only of its own members but more especially of the members of the Tribunaux Administratifs. A *Centre de documentation* exists at the Palais-Royal, which circulates to the Tribunaux Administratifs in mimeograph the transcript of recent decisions of the Conseil d'Etat; it also circulates abstracts of current *doctrine* from periodicals and *recueils* upon matters concerning the administrative jurisdictions. In this way, the decisions of the Conseil d'Etat are brought to the attention of the subordinate courts much more rapidly and effectively than by the medium of the annual volume of *Lebon* or the indiscriminate and selective reports of cases in the *recueils* and legal journals.[35]

The reform has lightened the burden of work upon the Conseil d'Etat. It is still, however, immense. The Conseil d'Etat has, therefore, continued to evolve means of simplifying its own task. Recently, the process of subdivision within the *Section du Contentieux* was carried a stage further by the creation of two new subsections, bringing the total number to eleven.[36] Because

[32] Rivero, "La réforme du contentieux administratif" (R.D.P., 1953, 941).

[33] Doubted by Lucas, "Recours pour excès de pouvoir et double degré de juridiction" (Dalloz, 1957, Chron. 115).

[34] For this shape, see Hamson, *op. cit.*, pp. 118–120, and for an example in translation, Schwartz, *op. cit.*, p. 342.

[35] Also, members of the Conseil d'Etat habitually contribute notes and articles to such legal periodicals as *Actualité Juridique* (regarded almost as the mouthpiece of the administrative order of courts), the old-established *Revue du Droit Public*, and the relatively new *Revue Administrative* and *Revue Pratique du Droit Administratif*. In addition, the Conseil d'Etat publishes annually its *Etudes et Documents* on the activities of the Conseil and matters of general interest to *l'ordre administratif*. Links between the Conseil and the Tribunaux Administratifs are also strengthened by the existence of a *mission d'inspection* drawn from the Conseil which visits all the Tribunaux periodically: see the article of Lachaze, *Etudes et Documents*, 1950, p. 42.

[36] Law of August 4, 1956; the new subsections began work in January, 1957.

of the peculiar internal structure of the *Section du Contentieux*[37] the addition of the tenth and eleventh subsections will increase by two the organs of instruction and by one the organs of judgment. This arises from the fact that the tenth subsection will pair with the second and the eleventh with the first, when sitting to decide a case, although each may proceed independently with an instruction.

The new subsections will help to spread the load somewhat within the Conseil d'Etat, although the burden upon the President and *Président-adjoint* of the *Section du Contentieux* will be no less since one of them must preside over every sitting of the more important organs of judgment—whether *deux sous-sections réunies*, or the whole *Section du Contentieux*. In this way, they help preserve a unity within the case-law of the Conseil d'Etat despite its numerous organs of judgment. But the need for their presence sets a physical limit upon the process of subdivision within the *Section du Contentieux*. Indeed, it is only since 1956 that the President has had the assistance of a *Président-adjoint*: previously, he carried the whole burden alone. Small wonder that a recent and most distinguished holder of that office died of overwork.

(2) *Effects upon the Tribunaux Administratifs*

By the reform the Conseils de Préfecture have been transformed into Tribunaux Administratifs. This is more than a mere change in name. A new jurisdiction, a new status, and a new importance have been conferred upon the local administrative courts. No longer are they in the position of beggars gathering up the crumbs that fall from the table of the Conseil d'Etat: they have become the principal forum of administrative justice, and on their capacity to justify the trust placed upon them depends the whole future of administrative justice in France.

(a) *Increase in activity.* The immediate effect of the reform upon the local courts was to transfer to them a large part of the backlog in the files of the Conseil d'Etat. As we have seen, no fewer than 8,500 dossiers were distributed among the Tribunaux Administratifs by the application of the new rules of jurisdiction.

In the second place, the majority of new cases justiciable in the administrative order of courts are now lodged with the Tribunaux Administratifs. In comparison with the previous activity of the Conseils de Préfecture, the Tribunaux Administratifs now attract many more cases. The figures vary considerably from tribunal to tribunal: the increase is greater in the tribunals which serve more populous regions; and Paris presents a special case.[38]

[37] Described by Hamson, *op. cit.*, Chap. 3.

[38] The Tribunal Administratif de la Seine, which remained departmental in 1926, handles many times more cases than any other single Tribunal. Commentators feared that the reform might merely shift the bottleneck in administrative justice from the Conseil d'Etat to the Tribunal de la Seine,

Moreover, the quantitative increase is accompanied by a qualitative increase in that the average difficulty of the cases falling within the new jurisdiction of the Tribunaux is much greater than those within their old jurisdiction. By way of example, the following statistics illustrate the effect of the reform upon the volume of cases before the Tribunal Administratif de Lyon, which is one of the busiest provincial tribunals and serves the five departments of Rhône, Ain, Ardèche, Loire, and Saône-et-Loire.

Plaints lodged in the Tribunal Administratif de Lyon[39]

Period:	1.10.54 to 1.10.55	1.10.55 to 1.10.56	1.10.56 to 1.10.57
Contentieux fiscal (unaffected by the reform)	432	336	350
Contentieux général:			
"Ancien Contentieux"			
i.e., cases which would have come to the court under the rules of jurisdiction prevailing before the reform	227	230	264
"Nouveau Contentieux"			
i.e., cases coming to the court under the extensions of jurisdiction effected by the reform ...	439	443	162
Percentage increase as a result of the reform	40	44	21

The sharp decrease in plaints under the new jurisdiction in the year ending October 1, 1957, may be due to accidental causes peculiar to the Lyons Tribunal. On the other hand, there are some indications that the public are tending to have less recourse to their local Tribunal Administratif now that the novelty of its existence has worn off. At first, the public were attracted by the proximity of a local, and hence more convenient, forum for their contest with the Administration, but now they are beginning to find local administrative justice a dull business which works no miracles on their behalf and towards which their legal adviser, the local practitioner, often displays an attitude of incomprehension mingled with suspicion. Nevertheless, figures show a marked and persistent increase since 1953 in the number of cases being brought before the administrative order of courts as a whole.[40] This increase is a practical testimony to the merits of that *idée fixe* of

but the congestion has proved less serious than expected, largely due to increasing the organs of judgment within the Tribunal: it is now divided into five sections, which operate in a manner similar to the subsections of the *Section du Contentieux* at the Palais-Royal.

[39] I am indebted to the *Secrétaire-Greffier* of the Lyons Tribunal for these figures.

[40] In the judicial years 1952–53, the last year before the reform took effect, 3,570 out of the 6,020 cases lodged with the Conseil d'Etat would now fall within the jurisdiction of the Tribunaux Administratifs; in 1955–56, 12,476 cases were lodged with the Tribunaux which would previously have gone to the Conseil d'Etat—an increase of some 350 per cent.: see *Etudes et Documents*, 1957, p. 131.

the French—*la justice au domicile*: all the French commentators emphasise that the reform has the great virtue of bringing administrative justice closer to the citizen.

(b) *Slowness of administrative justice.* The increase in the total business of the Tribunaux Administratifs has naturally entailed a slowing down in the speed with which a case is brought to judgment. Two years is about the normal time taken in the busier tribunals. At Paris the interval is longer. This period cannot fairly be compared with the speed with which a case is brought to trial in an English court. For the written and inquisitorial character of the procedure before the Tribunaux Administratifs naturally tends to absorb more time, especially when, as so often, the *avocat* of the *administré* does not exert himself to accelerate the proceedings.

Members of the Tribunaux Administratifs are anxious to make their justice swifter, although not unmindful that this may encourage yet further litigation in their courts. They realise that even a delay of two years may amount in some instances to a virtual denial of justice. The most obvious way to make the wheels turn more quickly is by increasing the number of judges. The total establishment of the Tribunaux Administratifs is only about 150, and of these at least thirty-six are absorbed by the Tribunal Administratif of Paris. The *corps* of administrative judiciary is thus very small. They complain that they are greatly overworked in comparison with their counterparts in the civil and criminal courts.[41] Certainly, they work without many advantages which the ordinary judiciary enjoy; in particular, they receive less help from counsel, either because the litigant appears in person (a right not enjoyed in the higher civil and criminal courts) or because the *avocat* entrusted with the case is quite unversed in the mysteries of the administrative procedure.

The prospects of any considerable increase in the staffing of the Tribunaux Administratifs do not appear very good. The French legislature is evidencing a certain disenchantment with the whole administrative order of courts, even the Conseil d'Etat, so that no financial concessions are likely from that source.[42]

Another way to speed the work would be for the Tribunaux Administratifs to be content with a somewhat less than perfect justice. Members of these courts have suggested that the painstaking methods of preparing and examining a case which suit the rarefied atmosphere of the Conseil d'Etat—and produce there many decisions of a classic perfection—may have to be modified in

[41] The reforms of December, 1958, will now redress the balance considerably.

[42] As judicial appointments in the Tribunaux now need the approval of the Minister of Justice, as well as of the Minister of the Interior, the former may bargain for the latter's support for extra appointments to the judicial order of courts; in the result, the Minister of Finance is likely to avoid concessions to either Minister.

the rough and tumble of the regional courts. For the speed in which a judgment can be given may be a factor no less important to the aggrieved citizen than the quality of that judgment when given. Even rough justice may be tolerable, be it only swift. This argument must not, of course, be taken too far: the Tribunaux Administratifs are alive to their new responsibilities; but their inadequate facilities and difficult conditions of work may reasonably make them content with a standard of decision which would hardly satisfy the Palais-Royal. Their complaint is that a speedier, but less exhaustively studied, decision may, despite the paradox, be more just.

(c) *New conflicts of jurisdiction.* The old problem of the respective spheres of the administrative and civil order of courts remains unaffected by the reform.[43] Little need be said here of the nature of this problem and of its solution, although a word of caution may be desirable. For Anglo-American students of French administrative law have tended to exaggerate the number and importance of cases of conflict between the two orders of courts. Most cases fall clearly into one or the other jurisdiction. The law confers jurisdiction upon one or other set of courts in broad categories of cases. It is only the borderline cases which give rise to difficulty, and these are but a small proportion of the total number of cases coming before the two orders of courts. Moreover, the borderline itself is being constantly demarcated with greater precision through the case-law of the *Tribunal des Conflits* and the supreme tribunals of each order, the *Cour de Cassation* and the Conseil d'Etat. Admittedly, this case-law is of a high degree of complexity and abounds in subtle, sometimes illogical, distinctions; but perhaps this complexity must be accepted as the price to be paid for the separation of administrative from civil jurisdiction, a separation which has brought many compensating benefits, not least being the effectiveness and extent of judicial control upon executive discretion.

To this fundamental cleavage of jurisdiction the reform has now added further complexities of divided jurisdiction within the hierarchy of administrative courts. For, granted that a given case appertains to the administrative jurisdiction, two further questions may still have to be answered before the case can be properly attributed to its appropriate court.

In the first place, the case must be considered in regard to the respective jurisdictions of the Conseil d'Etat on the one hand and the Tribunaux Administratifs on the other. This problem has already been discussed above, the guiding principle being that the Tribunaux Administratifs have competence over all administrative cases that have not been expressly reserved to the Conseil d'Etat.

[43] See, *e.g.*, Waline, *op. cit.*, pp. 55–95, for an idea of the extent of this problem.

If the case falls within a category reserved to the Conseil d'Etat the second question will not arise. But if the case comes within the general jurisdiction of the Tribunaux Administratifs, one has to answer the subsidiary question: "To which Tribunal Administratif must this case be brought?"

The answer has to be looked for in the *Règlement d'administration publique* of November 28, 1953, articles 4 to 16.[44] Again, the pattern is the familiar one of a general principle subject to a number of exceptions. The general principle is that jurisdiction belongs to that Tribunal Administratif in whose area the administrative authority concerned has its official seat.[45] This authority will be either the author of the decision which is being impleaded or the signatory of the administrative contract in question.

The exceptions to this principle are sweeping and various. They form no logical group, but have been selected with the object of removing out of the competence of the Tribunal Administratif of Paris a large number of the cases which the general principle would otherwise bring into that court, in whose area are situated all the Ministries and most of the central administrative authorities.[46] To catalogue these exceptions would be pointless, but the criteria on which they determine jurisdiction include:

the residence of the complainant,[47]
the place of execution of a contract,[48]
the situation of property,[49]
the place where a profession or business is carried on,[50]
the place where the act complained of has occurred.[51]

These rules of jurisdiction are characterised as "*d'ordre public.*"[52] This means that it is not open for the courts or the litigants to disregard or waive their application. Only one exception is admitted: in administrative contracts the contracting parties may agree that disputes should be cognisable by some Tribunal Administratif other than that which would otherwise have jurisdiction.

(d) *Legal representation.* The reform brought no new departure in the procedure which had previously been followed by the

[44] For the text, see Choublier et Compain, *op. cit.*, p. 198; de Font-Réaulx, *op. cit.*, p. 21; *Etudes et Documents*, 1953, p. 166s.
[45] Art. 4, al. 1.
[46] See Braibant, *op. cit.*; Vignes, "La compétence à l'intérieur de la juridiction administrative" (Rev. Prat. du Dr. Admin., 1957, Nov. VII and Dec. VI); Gazier et Long, "La compétence à l'intérieur de la juridiction administrative" (Actualité Juridique, 1954, 65); Chailley, "La réforme du contentieux administratif: règles de compétence" (Dalloz, 1954, Chron. 153).
[47] Art. 7.
[48] Art. 13.
[49] Art. 8.
[50] Art. 12.
[51] Art. 16.
[52] Art. 5.

Conseils de Préfecture on the basis of the Law of July 22, 1889.[53] There were, however, some important modifications. Some are too technical for discussion here (*e.g.*, the adoption from the Conseil d'Etat of the rule of the *décision préalable* and the two months' period of limitation).[54] But mention must be made of the new rule concerning legal representation.[55] Under the Law of 1889 a person might conduct his own case before the Conseil de Préfecture in the sense that he was permitted to conduct the written procedure—by the lodging of a written plaint (*recours*) and supporting *mémoires*—and to submit his oral observations at the hearing; moreover, the complainant was allowed a free choice of mandatory to conduct the case on his behalf, although if he chose an *avocat* or *avoué* his lawyer then enjoyed the privilege of being able to remove the documents in the case from the court office instead of having to consult them there.

The Decree of September 30, 1953, alters this. In the first place, the only permitted mandatory is either an *avocat* or an *avoué*[56]: the latter must practise in the area of the Tribunal Administratif seized of the case, and only the former has the right to present oral observations at the hearing. In the second place, the general rule that a party might proceed without legal representation is replaced by the rule that the assistance of an *avocat* or *avoué* is obligatory for the conduct of the written procedure,[57] save where otherwise provided. Contrary provision is made by the Decree in a number of important cases, and these exceptions may well outweigh the rule. For example, the services of a lawyer are not necessary in (1) proceedings which used to go before the Conseils de Préfecture; (2) plaints for excess of power; (3) pension cases; (4) proceedings which before the reform of 1953 would have

[53] The new Tribunaux have kept, therefore, the special procedures relating to *constats d'urgence*, *expertises*, *enquêtes*, *visites des lieux*, *interrogatoires*, *verifications d'écriture*, which the Conseils de Préfecture were allowed because of their proximity to the parties or to the matter in dispute; they retain also the various procedures for fiscal matters, disputed elections, tumbledown houses, highway infringements, etc., laid down in special texts.

[54] For a short account, see Choublier et Compain, *op. cit.*, pp. 101–115; significantly, the Tribunaux Administratifs now deliver a "jugement au nom du peuple français," armed with *la formule exécutoire*; previously, the Conseils de Préfecture issued their decision as an *arrêté*. The reform also conferred upon the Tribunaux an extended power of *référé* (a special interlocutory procedure in cases of urgency) and a new power of *sursis d'exécution*, whereby, exceptionally, a stay of execution of the challenged act of the administration might be granted by the Tribunaux at the outset of the proceedings: these two powers of *référé* and *sursis* are of great practical importance and are discussed fully in Waline, "Le référé administratif" (R.D.P., 1957, 296) and Gabolde, "Les nouveaux pouvoirs d'urgence de juge administratif et le sursis d'exécution" (Dalloz, 1953, Chron. 189).

[55] See Heurté, "Avocats et Tribunaux Administratifs" (Actualité Juridique, 1955, I, 98).

[56] The *avocat* may belong to a local Bar or to the special order of *Avocats au Conseil d'Etat et à la Cour de Cassation* who combine the functions of *avocat* and *avoué* before the two supreme tribunals.

[57] But not for the *observations orales*, which the complainant may present in person.

been exempted from the requirement of legal representation when brought before the Conseil d'Etat. In addition, a general dispensation from the need of legal representation is granted to the State whenever it is involved in proceedings before the Tribunaux Administratifs.

In the result, of the two main classes of case now coming before the Tribunaux Administratifs (apart from *le contentieux fiscal*) plaints for excess of power will not necessitate the services of a lawyer, but in plaints for an indemnity (*recours de pleine juridiction en indemnité*) an *avocat* or *avoué* will normally have to be engaged in order to conduct the written procedure.[58] In practice, the former is engaged, as he alone has a right of audience at the hearing.

In the cases where legal assistance is not obligatory, many complainants do, in fact, conduct their own case, although behind the scenes they are frequently assisted in the drafting of their plaint and *mémoires* by the ubiquitous *homme d'affaires*, the general consultant on matters of law, business and tax-evasion, who can only be termed professional in the sense that his advice has to be paid for.

IV. Wider Repercussions of the Reform

Not unexpectedly, a reform as profound as that of 1953 has had wide repercussions outside the immediate circle of the administrative courts.[59] It is proposed to discuss in turn the reactions to the reform of the Administration, the ordinary civil and criminal jurisdictions, the Bar, and the French Parliament.

Mention has already been made of the fear that the Administration might nullify the reform by appealing systematically against adverse decisions in the courts of first instance. To date this fear has proved unjustified, although this does not mean that the danger has passed.

More difficult to assess is whether the reform has caused any lessening of that respect in which the Administration were wont to hold the jurisprudence of judicial control when it was enshrined in the pronouncements of *la Haute Assemblée*. It would not be surprising if less respect were shown to the decisions of the local tribunals, whose members—often lodged cheek by jowl with the active administrators in the same Prefecture—have not that remoteness which lends a certain enchantment, a *mystique*, to the *pronunciamenti* from the Palais-Royal. Nor have they the same intellectual eminence as a *corps*, whatever their individual qualities. Their lower salary, too, means lower prestige. All these factors

[58] A needy litigant can obtain *assistance judiciaire* and the designation of an *avocat* through his local *Tribunal Civil*.

[59] See Piernet, "Resultats pratiques de la réforme du contentieux administratif à l'échelon régional" (*Actualité Juridique*, 1957, I, 77).

may contribute to change the traditional attitude of the Administration towards the administrative courts. A greater restiveness towards this curb is likely to become manifest, especially if the new Tribunaux prove less adroit in handling the reins than the Conseil d'Etat. The writer doubts, however, whether this restiveness will grow into open rebellion against the administrative courts: the respect for legality seems too strong. But a distinguished French administrative lawyer has voiced the view that the reform will precipitate a clash between the active administrator and the administrative judge.[60]

Until the reforms of December, 1958, it seemed that the ordinary civil and criminal jurisdictions were too established a feature of the French legal landscape to be much affected by what happened in the rival administrative jurisdiction. There were signs, however, even under the Fourth Republic, that the drastic upheaval of *l'ordre administratif* was inducing *l'ordre judiciaire* to think about setting its own house in order. A project was, in fact, afoot whereby the civil and criminal courts would undergo a similar sort of rationalisation to that which occurred in 1926 in regard to the Conseils de Préfecture. For it was well recognised that many of the ordinary courts in the smaller towns and country districts were very much under-employed. No doubt any move to eliminate redundant jurisdictions by the normal process of legislation would have been bitterly resisted by local judges and practitioners as well as opposed by the lawyers entrenched in the National Assembly: in England we can remember the opposition to similar provisions in the Criminal Justice Act, 1948, and local loyalties are even more fervent in France. Hence, the government of General de Gaulle, profiting by its special powers, rushed through the reforms already mentioned.[61]

Another interesting repercussion of the reform of 1953 is the emergence in certain quarters of hostility towards the very existence of a separate administrative jurisdiction.[62] This hostility has always been present in some degree amongst the practitioners of the *droit civil*,[63] but so long as the principle of separation of powers held sway unquestioned, logic dictated a duality of jurisdictions—or so it was thought.

To the French mind logic is still a dictator, but the premises on which that logic operated seem of late to be undergoing a fresh and critical reassessment. As a general precept of political science,

[60] Guillien, "Le problème de la juridiction administrative" (*L'Evolution du Droit Public*, Sirey, 1956, 255).

[61] See notes 2 and 23, *supra*.

[62] See Le Tarnec, "Faut-il supprimer les juridictions administratives?" (*La Vie Judiciaire*, 1957, No. 574, 1); L'Huillier, "Nouvelles réflexions sur le service public" (Dalloz, 195, Chron. 91); *Société des transports automobiles Boldoni* (Dalloz, 1957, Jur. 499, note de Mimin); Guillien, *op. cit.*

[63] "La disparition (des juridictions administratives) est ouvertement souhaitée et poursuivie par maints praticiens, adversaires acharnés de la procédure écrite et peu désireux de s'adapter aux normes et techniques du droit administratif": Piernet, *op. cit.* (A.J., 1957, I, 77) at 78.

the theory of separation of powers is still not seriously questioned; but more flexibility in translating the theory into practical institutions is being demanded. No longer is the existence of separate administrative courts universally commended; the chorus in praise of the Conseil d'Etat and the courts subordinate to it is now marred by discordant notes of criticism and even hostility, both from practitioners of the civil law and from Parliament.

The hostility of the practitioner, both *avoué* and *avocat*, admits of various explanations. So long as administrative justice was concentrated in Paris and few matters of moment were litigated locally, the provincial lawyer had little contact with the *droit administratif*. He could safely ignore the subtleties of its case-law and the peculiarities of its highly original procedure of trial. Then, overnight, an administrative court of first instance is placed on his doorstep. To his civilist technique, a positive handicap before this court, he must add a new technique if he is to do justice to his client's case. All this is not easy, especially for the older man. Small wonder that an undercurrent of resentment is present among members of the provincial Bars. The superior merits of the administrative procedure are not self-evident to them, and they are aggrieved when their civilist tactics earn the court's disfavour. The subtleties of the substantive law must now be wrestled with in advising their client and conducting his case; naturally, they sigh for the clear-cut principles of the *Code civil* when launched upon the uncodified (hence uncharted) pages of *Lebon*. In practice, the specialised *Avocats à la Cour de Cassation et au Conseil d'Etat* are frequently entrusted with the more important proceedings before the Tribunaux Administratifs in preference to the inexperienced local practitioners. Whilst this practice may now be welcome to the hard-pressed judiciary in the local courts, their longer-term interests call for the creation of specialists in *droit administratif* in each local Bar. To this end the Presidents and members of the Tribunaux Administratifs organise lectures for the local Bar, as well as encourage interest through informal contacts with the profession.

Nor do the lawyers lack support in Parliament. *Avocats* abound in the National Assembly which, under the Fourth Republic, was showing itself increasingly critical of the administrative courts. A recent manifestation is the Law of December 31, 1957, which transfers to the civil courts all actions for the reparation of damage caused by any vehicle, even though the vehicle belongs to an administrative authority.[64] At one sweep

[64] This was the result of a compromise over a section of the new Code of Penal Procedure which proposed to make the criminal tribunal competent to award damages to the victim as *partie civile* against the administrative authority *civilement responsable* for the act of the convicted person. See Méjan, "Les avatars de l'article 3 du projet de Code de procédure pénale" (Rev. Admin. 1957, 581).

this Law removes from the administrative courts what is perhaps the commonest kind of recours *en indemnité*: the injury of a citizen, or damage to his property, by an administrative vehicle.[65]

In some respects the Law of December 31, 1957, was welcomed by the administrative courts. At least it removed from their competence a whole block of litigation and so helped to reduce the burden upon them. From the point of view also of the litigant the change was welcome; his claim would go to the same court, follow the same procedure and be subject to the same rules of law, whether the vehicle responsible for his hurt belonged to a private individual or to an administrative authority. Divergence in the principles of tortious liability would no longer be possible in the important sphere of road traffic accidents. But, although a desirable change on all these grounds, the parliamentary blessing upon it stemmed in part from an eagerness to restrict the activity of the administrative jurisdiction.[66]

There have not been wanting proposals for changes of a far more revolutionary character. One of the most extreme is that of Professor Guillien, of Lyons University, who has urged the creation of mixed local courts, combining the present Tribunaux Administratifs with judges from the civil courts of first instance.[67] These mixed courts would try all cases of an administrative nature, other than the *recours en annulation*, which would remain (as before 1953) the exclusive preserve of the Conseil d'Etat. By this proposal the *Tribunal des Conflits* would, in effect, be replaced by a system of local conflict tribunals empowered not only to resolve the conflict but also to try the issue. It is argued that the resolution of any conflict of jurisdiction necessarily involves a prejudgment of the issue, so that recourse to a second court to try the issue is superfluous and time-wasting.

This particular proposal rejects the logic behind the present duality of jurisdictions. No doubt it is too revolutionary for most tastes, but there are many signs of an increasing impatience with the complexities which this duality produces: witness the Law of December 31, 1957, discussed above.

Conclusion

The reform of 1953 is a resolute attempt to adapt the French system of administrative courts elaborated in the nineteenth century to the needs of a welfare State of the twentieth century.

[65] Likewise, by decree No. 1285 of December, 1958, the *Tribunaux de Commerce* have lost their jurisdiction to the civil courts in cases where the vehicle of a *commerçant* is responsible for damage to a third party.

[66] On the other hand, the transitional government of General de Gaulle showed itself sympathetic to the administrative jurisdictions, as is evident from its imitation of certain features of the administrative system in the reforms of December, 1958, relating to the magistracy and courts *de l'ordre judiciaire* (see note 2 above).

[67] Guillien, "Essai sur une réforme générale du contentieux administratif" (Dalloz, 1955, Chron. 97).

The approach adopted has been a cautious one: the well-tried institution of the Conseil d'Etat has kept a dominant role in the changed pattern of courts. But the old Conseils de Préfecture, in their new guise of Tribunaux Administratifs, have been entrusted with new and heavy responsibilities. That this trust was not misplaced has been proved by the success of the new courts in discharging these responsibilities in the first quinquennium of the reform. But what will be the ultimate effect of the reform on the substantive *droit administratif* remains an interesting speculation. Certainly, French administrative justice has entered upon a new and important chapter.

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DELEGATION BY TRUSTEES: A REAPPRAISAL

In this article it is proposed briefly to analyse the effect of the Trustee Act, 1925, on those established principles of equity, which related to the power of a trustee to delegate his functions.* It will be suggested that the relevant provisions of this statute should be interpreted in the light of the pre-1926 decisions; only such an interpretation can reconcile satisfactorily the various sections of the Act. Consequently, it will first be necessary to examine the cases before the Trustee Act, 1925.

I. The Law Before the Trustee Act, 1925

The general rule, governing the power of a trustee to delegate his powers and duties as trustee, was laid down by Lord Langdale M.R. in *Turner* v. *Corney* [1] in the following terms:

> "Trustees who take on themselves the management of trust property for the benefit of others have no right to shift their duty on other persons; and if they employ an agent, they remain subject to the responsibility towards their *cestuis que trust*, for whom they have undertaken the duty."

That this principle of *delegatus non potest delegare* could not be applied in its full rigour was recognised at an early date. In *Ex p. Belchier*,[2] Lord Hardwicke had suggested that a trustee could delegate in cases of necessity. "There are two sorts of necessity," said his Lordship. "First, legal necessity; secondly, moral necessity." Legal necessity was simply the rule "that if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary." Moral necessity, however, arose from the "usage of mankind;" the trustee must act "as prudently for the trust as for herself, and according to the usage of business." In accordance with these principles, his Lordship held that it was common practice, arising from the usage of business, to employ a broker to sell tobacco by auction, and to allow the broker to receive the money resulting from such a sale.

These observations of Lord Hardwicke were confirmed by the

* I am particularly indebted to Professor S. J. Bailey who, in his lectures on the Law of Trusts, first suggested this problem to me. He has been kind enough to read this article in typescript and has made a number of acute criticisms and suggestions.

1 (1841) 5 Beav. 515, 517.

2 (1754) Amb. 218. See also *Clough* v. *Bond* (1838) 3 My. & Cr. 490, 497.

Court of Appeal and the House of Lords in *Speight* v. *Gaunt*,[3] a decision of great importance. In that case, a trustee, one Gaunt, had employed at the request of the beneficiaries,[4] a broker, C, to purchase some £15,000 of corporation stock. C presented Gaunt with a bought note[5] and told him that the money would have to be paid the next day so that the account might be settled. Gaunt paid the money to C. A few days later Gaunt inquired whether the securities were ready and was told by C that it would take some time to obtain them. A similar excuse was given on subsequent occasions. C, having absconded with the money, the beneficiaries brought a suit against Gaunt for a declaration of breach of trust. It was argued that Gaunt had been negligent in that he had employed a broker to purchase the stock[6]; in that the form of the bought note would have indicated to a reasonable trustee that the stock had not been bought on the market but direct from the corporation and that, therefore, he should have paid the company direct; and, finally, in that he had delayed in getting in the securities. Bacon V.-C. gave judgment for the plaintiffs but his decision was reversed by the Court of Appeal. The House of Lords, Lord FitzGerald *dubitante*, affirmed the judgment of the Court of Appeal in favour of the trustee, Gaunt.[7]

Sir George Jessel M.R., with his usual clarity, laid down the principles applicable in the following terms[8]:

> "It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound because he is a trustee to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the

[3] (1883) 22 Ch.D. 727 (Bacon V.-C. and C.A.); (1883) 9 App.Cas. 1 (H.L.).

[4] Gaunt had wanted to appoint his own broker.

[5] There was evidence before the court that the form of the bought note would have indicated to an expert that the stock had not been bought on the market. The space for the date of the settling day had not been filled in. It was mooted whether Gaunt would have been liable if he had known that the bonds were bought direct from the corporation. Lord Selborne in the House of Lords, and Bowen L.J. in the Court of Appeal, were inclined to this view, concurring with the learned Vice-Chancellor. The other judges expressed no opinion.

[6] This allegation was not pressed.

[7] In fact, *Ex p. Belchier* was confirmed. *Cf.* Bowen L.J. in the Court of Appeal (*loc. cit.*, at p. 763); "Lord Hardwicke's view, putting aside peculiarities of language, is based upon reason and common sense."

[8] In the Court of Appeal (*loc. cit.*, pp. 739–740). To this rule there is one exception, as was admitted by Lord Blackburn in the House of Lords (*loc. cit.*, p. 19), namely, that a trustee must choose investments authorised by the trust instrument. When investing, a trustee must exercise the care which he would exercise if he were under a moral obligation to provide for the beneficiary. Whereas a reasonable man of business may take a risk, a trustee must not.

> business in any other way. If it were otherwise, no one would be a trustee at all. He is not paid for it. He says, 'I take all reasonable precautions and all the precautions which are deemed reasonable by prudent men of business, and beyond that I am not required to go.'" [9]

On the facts, the defendant, Gaunt, had acted prudently, as a reasonable man of business would have acted; it was not negligent of him to have appointed a broker, nor can he be said to have acted unreasonably in paying over the money on the presentation of the bought note nor in failing to get in the securities.

In contrast, however, to the "reasonable" conduct of Gaunt, the following examples may be cited from the pre-1926 cases where it was held that the trustee had not acted as a reasonable man of business in delegating his functions.

(a) It was unreasonable conduct on the part of the trustee to employ an agent to do work not normally undertaken by that class of agent. Consequently, a broker should not be employed as a solicitor,[10] and a solicitor should not be given authority to invest in general, as opposed to specific, investments.[11]

(b) The trustee was liable if he failed to exercise a proper supervision over the agent to whom he had delegated his duties. He, the trustee, still had to "exercise his judgment on every issue" [12] and he could not give his agent *carte blanche* to act as he pleased. In particular, trust money had to be kept under his control. Thus, he was liable if the trust money was left in the hands of his agent for an unreasonable length of time or if, as in *Matthew* v. *Brise*,[13] he failed to take proper precautions for the protection of the trust fund and allowed Exchequer bills to remain undistinguished in the hands of a banker. Again, in *Rowland* v. *Witherden*,[14] Lord Truro L.C. held that it was the duty of a trustee to assure himself that money entrusted to a solicitor had been invested. The verbal assurances of the solicitor were not sufficient for this purpose.

(c) The trustee could never delegate to his agents his discretions, as opposed to his ministerial duties. These he was bound to perform

[9] Jessel M.R. thought (*loc. cit.*, p. 746) that "it is the duty of the court . . . to lean to the side of the honest trustee . . .to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit." Lord FitzGerald in the House of Lords (*loc. cit.*, p. 31) did not accept this view, and Bowen L.J. (*loc. cit.*, p. 766) expressly left the point open.

[10] *Re Earl of Lichfield* (1737) 1 Atk. 87; *Ghost* v. *Waller* (1846) 9 Beav. 497; *Fry* v. *Tapson* (1884) 28 Ch.D. 268; *Re Gasquoine* [1894] 1 Ch. 470.

[11] *Rowland* v. *Witherden* (1851) 3 McN. & G. 568.

[12] Underhill, *Law of Trusts and Trustees* (6th ed., p. 241); see also the judgment of Kekewich J. in *Re Weall* (1889) 42 Ch.D. 674.

[13] (1843) 6 Beav. 239.

[14] (1851) 3 McN. & G. 568. The trustee did not even require the sight of the mortgage deed, but simply paid the money over to the solicitor.

and exercise himself [15] so that a delegation to an agent of his discretion to appoint and select agents would be ineffective [16]: *a fortiori* if the trustee attempted to wash his hands of the trust by delegating all his discretions.[17]

Although in the pre-1926 trusts a trustee-indemnity clause was common, only in very exceptional cases [18] did the courts interpret such a clause as a blanket protection for the trustee. An indemnity clause was embodied in section 31 of Lord St. Leonard's Act, 1859, and in section 24 of the Trustee Act, 1893, which superseded section 51 of the 1859 Act. This clause was substantially the same as the indemnity clause, which was standard in private trust instruments, and was read subject to a contrary intent into every trust instrument. Section 24 read as follows:

> "A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default. . . ."

Both this clause and section 31 of the 1859 Act were interpreted as a statutory recognition of the general doctrine of the court of equity, namely that the trustee must act as a reasonable man of business.[19] The trustee was held liable for his failure to take due diligence, despite the exemption of "wilful default," which words would have seemed to suggest that the trustee would be liable only if he intended to commit a breach of duty or was recklessly careless, not caring whether his acts or omissions were or were not a breach of duty. Lord Selborne L.C. commented in *Re Brier* [20] that,

> "The statute incorporated, generally, into instruments creating trusts, the common indemnity clause which was usually inserted in such instruments. It does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law, and appears

[15] Lindley L.J. in *Speight* v. *Gaunt*, *loc. cit.*, p. 756; see also Lord Selborne in the House of Lords, *loc. cit.*, p. 5.

[16] *Fry* v. *Tapson* (1884) 28 Ch.D. 268.

[17] Lord FitzGerald in *Speight* v. *Gaunt*, *loc. cit.*, p. 29.

[18] For such a case, see *Wilkins* v. *Hogg* (1861) 3 Giff. 116. There was the usual indemnity clause plus the following clause: "any trustee who should pay to his co-trustee, or enable him to receive monies, for the general purposes of the will, should not be obliged to see the due application thereof, or be responsible by express or implied notice of the misapplication." See also, *Pass* v. *Dundas* (1880) 43 L.T. (N.S.) 665.

[19] *Rehden* v. *Wesley* (1861) 29 Beav. 213; *Fenwick* v. *Greenwell* (1847) 10 Beav. 412; Lewin, *Trusts*, 8th ed., p. 274.

[20] In the Court of Appeal (1882) 26 Ch.D. 238, 243. His Lordship was commenting on section 31 of the 1893 Act.

> to me to throw the *onus probandi* on those who seek to charge an executor or trustee with a loss arising from the default of an agent, when the propriety of employing the agent has been established."

To have limited " wilful default " to intentional or reckless breaches of duty or both would have been to reject the *ratio decidendi* of *Speight* v. *Gaunt* and the norm of the reasonable man of business. Section 31 of the 1859 Act was in force at the time of the decision in *Speight* v. *Gaunt* and was therefore read impliedly into the trust deed. Yet Lord Selborne L.C., alone of the eight judges,[21] mentioned the section and he merely commented that Gaunt had not been guilty of wilful default in failing to obtain the stock certificates from the broker. The reason for this judicial silence is clear. The judges were agreed that the section added nothing to the law. There was no necessity, therefore, to comment on its effect. It may well be, as was stated by Romer J. in *Re City Equitable Fire Insurance Co., Ltd.*,[22] that the judges in these pre-1926 cases were not required to interpret specifically the words " wilful default," that it was sufficient to hold that, in these indemnity cases, the particular trustee had acted outside the scope of the indemnity clause and that an " ordinary indemnity clause has no application at all to a man who neglects the trust altogether." [23] But, whatever interpretation is given to the words, the clause did not excuse a trustee from acting with due diligence. Lindley L.J. summarised lucidly, in *Re Chapman*,[24] the meaning of " wilful default," when he remarked that,

> " Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment. . . . To throw on the trustees the loss sustained by the fall in value of securities authorised by the trust, wilful default, which includes want of ordinary prudence on the part of the trustees, must be proved."

II. The Effect of the Trustee Act, 1925

It is, in this section, proposed to examine in some detail the effect of the 1925 statute on the principles which have just been formulated.

Section 23 (1), the most important of the delegation sections, is new and was not contained in the 1859 or 1893 Acts. It reads as follows:

> " Trustees or personal representatives may, instead of acting personally, employ an agent, whether a solicitor, banker, stockbroker, or other person to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or the

21 *Loc. cit.*, pp. 4–5 and p. 13.
22 [1925] Ch. 407.
23 *Re City Equitable*, *loc. cit.*, pp. 438–439, 441.
24 [1896] 2 Ch. 763, 776.

> intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith."

Prima facie the section admits of a construction which would destroy the *ratio decidendi* of *Speight* v. *Gaunt*. Maugham J., as we shall see, so interpreted the section in *Re Vickery* [25] and substituted the subjective test of good faith for the objective standard of the reasonable man.

Section 23 (2) enables a trustee to delegate "any discretion or trust or power" and all powers of management where the trust property is situated outside the United Kingdom. There is no clause similar to the "good faith" clause of section 23 (1); the subsection states that the trustees shall not be responsible for any loss sustained by reason only of the appointment.

Section 23 (3) re-enacts [26] section 17 of the 1893 Act and permits "delegation to special agents in specified matters." [27] The proviso to the subsection enacts specifically that the trustee shall be liable if he allows trust property to remain in the hands of a banker or solicitor "for a period longer than is reasonably necessary" to enable the agent to transfer the property to the trustees.

Section 25 permits a trustee to delegate his "trusts, powers and discretions" if that trustee intends to be out of the United Kingdom for more than one month. The delegation is revoked by the return of the trustee although there is a saving clause in favour of a purchaser who deals in good faith with the agent. Certain formalities are prescribed and the trustee is expressly made liable for the "acts or defaults" of the agent. The section had been foreshadowed by the Execution of Trusts (War Facilities) Act, 1914.

Section 30 (1) is, in substance, similar to section 24 [28] of the 1893 Act. A trustee is liable for what he actually receives (notwithstanding any receipt signed for the sake of conformity), and not for the acts or defaults of a fellow trustee or of any "banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default."

The Act also empowers a trustee to delegate certain other powers but with these we shall not be concerned.[29]

Green v. *Whitehead* [30] and *Re Vickery* [31]

The meaning of section 23 (1) has arisen for decision in the two cases of *Green* v. *Whitehead* and *Re Vickery*. In *Green* v.

[25] [1931] 1 Ch. 572.
[26] With amendments.
[27] Hanbury, *Modern Equity*, 7th ed., p. 229.
[28] *Infra*.
[29] For example, ss. 8, 11, 21, 22 (3) and 22 (4).
[30] [1930] 1 Ch. 38.
[31] *Supra*, note 25.

Whitehead an estate was purchased by two partners, G and H, in 1925 and conveyed to them as joint tenants in fee simple. By virtue of section 36 of the Law of Property Act, 1925 they became on January 1, 1926, statutory trustees for sale holding for themselves in equity. In 1926 they contracted to sell a freehold reversion, forming part of the estate, to X and the contract remained uncompleted for two years. Two years later G gave a power of attorney to R authorising him to sell and convey any of "my property," whether held solely or jointly, in the county of L. The purchaser refused to complete on the ground that the vendors had contracted to sell as statutory trustees and the vendors could not compel the purchaser to accept a conveyance from H and R, acting on behalf of G.

Eve J. held that the delegation to R amounted to a complete delegation of the trust and that the vendors, having contracted to sell as statutory trustees, could not compel the purchaser to accept title from R and H. His lordship was of opinion that it was hardly possible to conceive of a "more complete delegation of the duties, powers and discretions of the trustee" and that such a delegation was not possible under section 23 (1). The wide powers of delegation conferred under section 23 (2) have no application if the trust property is within the United Kingdom.

The Court of Appeal confirmed the decision of the learned judge on the ground that the particular power of attorney only applied to land held by G as beneficial owner. Lord Hanworth M.R. stated, however, that he did not accept Eve J.'s view that the grant of a power of attorney was not possible under section 23 (1). In his opinion it was a purely ministerial act, which could be delegated by a trustee.[32]

Green v. *Whitehead*, therefore, is of little value in determining the scope of section 23 (1). The decision of Maugham J. in *Re Vickery* is the only case in which the interpretation of section 23 (1) has been directly before the court. The defendant in that case was the sole executor of the testatrix. He employed a solicitor, who unknown to him had been suspended from practice for five years. The solicitor obtained from the defendant the testatrix's Post Office Savings Bank Book and her War Savings Certificates. Some months later the defendant was informed by one of the beneficiaries that at one time the solicitor had been suspended from practice and he was requested by the same beneficiary to change the solicitor. The defendant did not do so, but continued to press the solicitor to settle the estate, which was of some £300 in value. The solicitor absconded. The beneficiaries proceeded against the defendant for breach of trust, alleging that he had permitted the solicitor to receive and retain the proceeds of the sale of the War Savings Certificates and the sums in the Post Office Savings

[32] This point is brought out only in the report in 46 T.L.R. 11.

Bank. There was evidence before the court that the defendant had issued a warrant, in respect of the War Savings Certificates, in favour of the solicitor. The learned judge found as a fact that the warrant had been given before the warning from the beneficiary.[33]

Maugham J. held that the defendant was not guilty of a breach of trust. By virtue of section 23 (1) of the Trustee Act, 1925 the defendant could delegate his powers although there was no legal or moral necessity so to do. "It is hardly too much to say that it[34] revolutionises the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not."[35] Section 23 (1) is a statutory reversal of the rule in *Ex p. Belchier*.[36] Secondly, the learned judge interpreted the words "in good faith" within this section subjectively. If the trustee appoints, honestly but foolishly, an agent then he is not liable for the agent's defaults, so that the trustee is protected if, in Holdsworth's phrase, he is an "honest fool."[37] Thirdly, section 30 (1) of the Trustee Act had no application to the facts of the case. His lordship defined the phrase "wilful default," within that section, following the judgment of Romer J. in *Re City Equitable Fire Assurance*,[38] so as to include only conscious or reckless breaches of duty (or both), and held that the defendant in *Re Vickery* was guilty of no such default.

The implications of the decision are startling. Would a trustee be protected if he appointed honestly a London valuer to value property in Newcastle? Would a trustee be protected if he appointed in good faith a broker to carry out business normally undertaken by a solicitor? Is he still under a duty to assure himself that money entrusted to a solicitor has been invested? Need he exercise any supervision over the acts of his agent? *Re Vickery* would suggest a negative answer to each of these questions. Such a conclusion is so surprising as to demand close examination of the reasoning of the learned judge.

Re Vickery—a criticism

It is the present writer's submission that, although in the result *Re Vickery* might be correctly decided, the reasons given by Maugham J. for the decision cannot be supported, and that it is consequently not safe or desirable for a trustee to rely on this decision as authority for the proposition that, "I am safe if I act

[33] At pp. 574–575, 584.
[34] s. 23 (1).
[35] *Re Vickery*, *loc. cit.*, at p. 581.
[36] *Supra*, that is, no delegation without legal or moral necessity. We would not dissent from this conclusion.
[37] Holdsworth in 47 L.Q.R. 463; also Potter in 47 L.Q.R. 330.
[38] *Supra*, note 22.

honestly but foolishly in appointing my agents."[39] His Lordship's interpretation of section 23 (1) must inevitably lead to a conflict between that section and the remaining delegation sections of the Act. Indeed, some of the sections would seem to be otiose if Maugham J. is correct.

(i) The interpretation of Maugham J. of section 23 (1) has rendered section 23 (3) of the Trustee Act "meaningless and unnecessary."[40] This subsection allows a banker or solicitor to give a discharge for any monies which have been paid to them, and allows the trustee to give to such agents custody of a deed or receipt signed by the trustee. The trustee is made liable if the trust monies are permitted to remain in the hands of the banker or solicitor for a "period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee."[41] The learned judge held that section 23 (3) was irrelevant in *Re Vickery* since the trustee had not purported to act thereunder. Foolish indeed will be the trustee who will so act; if the banker or solicitor is appointed "in good faith" within section 23 (1), then the trustee is protected even if the agent subsequently defaults. Harmony between the two subsections cannot be achieved by limiting section 23 (1) to agents other than bankers or solicitors, for the section is quite general in terms. The most obvious reconciliation of section 23 (1) and section 23 (3) is, of course, to construe the words "in good faith" in section 23 (1) so that they limit only the *act* of employment. In fact, the trustee will not be liable for his agent's defaults by reason only of an appointment, which was not legally or morally necessary, provided the appointment was in good faith.[42] Such an interpretation, which gives meaning to the words "without prejudice to such general power of appointing agents as aforesaid," which introduce and limit section 23 (3), was not acceptable to the learned judge.[43]

[39] Lewin (15th ed., p. 185) and Underhill (10th ed., p. 351) accept cautiously the decision. Hanbury (*op. cit.*, pp. 228–229) also accepts the case but subject to important limitations, namely, that a trustee advancing money on a mortgage should not employ the solicitor or valuer of the mortgagor, that a trustee must pay an agent only reasonable remuneration and that the *ejusdem generis* rule of interpretation will be applied to the words "or other person" within s. 23 (1). Keeton, in the latest edition of his *Law of Trusts* (8th ed., p. 257) is of opinion that the reasoning of Maugham J. is erroneous.

[40] Potter in 47 L.Q.R. 330.

[41] The learned judge's reasons for the absence of this proviso in s. 23 (1) are, with respect, unconvincing: "in many cases where, for example, a banker or other agent is employed by a trustee to receive money, the money cannot at once be conveniently paid to the trustee, but has to be employed by the banker or other agent in a number of ways" (at p. 581).

[42] *Cf.* the words of s. 23 (2), which concludes that trustees "shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby."

[43] For he had held that s. 23 (1) protected a trustee even for his agent's defaults after appointment.

(ii) If *Re Vickery* is correct it is difficult to see what is the precise scope of sections 23 (2) and 25. Both sections deal with situations where either the trustee or the trust property is outside the United Kingdom. It will be remembered that Eve J. in *Green* v. *Whitehead*[44] had considered section 23 (2) to be of much wider application than section 23 (1) and, certainly, there is a significant difference of wording. Whereas section 23 (1) speaks of the employment of an agent "to transact any business" in the execution of the trust, section 23 (2) enables the trustee to delegate in addition his "discretion"; similarly, section 25 permits a trustee to delegate his "discretions." It is clear that section 23 (1) is limited to ministerial acts, but it is difficult to see what extra powers are delegable under sections 23 (2) and 25. It is submitted that under neither section can the trustee rid himself of his trusteeship. The draftsman, in all probability, envisaged that under sections 23 (2) and 25 the trustee would be able to delegate certain particular discretions, such as the discretion to choose between various tenders, or the discretion to pay agents a reasonable sum in remuneration, or even the discretion to appoint an agent. Only if a trustee desires his agent to have such discretions should he purport to act under these sections, otherwise, the trustee should act under section 23 (1). The reason for this is a simple one—*Speight* v. *Gaunt*. Section 25 enacts specifically that the trustee shall be liable for the acts or defaults of his agent[45] and while it is true that section 23 (2) does not contain such a provision, it is significant that this subsection does say that the trustee shall not be liable for any loss by reason only of making the *appointment*. Consequently, even under section 23 (2) it is most probable that the norm of the reasonable man of business will determine the liability of the trustee for the acts or defaults of his agent once appointed. Thus, the wise trustee, if *Re Vickery* represents the law, will act in all cases under section 23 (1) and be protected by the umbrella of an honest appointment—even though the trustee will be out of the United Kingdom for more than a month and even though the trust property is outside the United Kingdom.

(iii) His Lordship in *Re Vickery* did not directly address his mind to the problem of reconciling section 30 (1) of the Trustee Act, 1925, with section 23 (1).[46] Maugham J. limited section 30 (1) to "bankers and brokers" and the words "any other loss"[47] to cases where the loss had arisen through the signing of receipts for the sake of conformity, or where the wrongful acts of another

[44] *Supra*, note 30.

[45] s. 25 (2).

[46] *Semble*, Maugham J. was of opinion that if the trustee was guilty of wilful default then he would have been liable. But he did not discuss the effect of this view on s. 23 (1).

[47] s. 30 (1) states that the trustee shall not be responsible for "... the insufficiency or deficiency of any securities, nor for *any other loss*, unless the same happens through his own wilful default." (Italics supplied.)

trustee or the agent with whom the trust money had been deposited had resulted in the loss, or where the loss is due to the deficiency or insufficiency of securities or other analogous loss.[48] This limitation does not solve, unfortunately, the conundrum of how a trustee can be free of liability if he appoints in good faith and yet later be liable for the acts or defaults of these particular agents if he, the trustee, has been guilty of a wilful default. Further, the learned judge's definition of "wilful default" as a conscious or reckless breach of duty on the part of the trustee cannot be supported; the words should have been construed, in their pre-1926 sense, so as to include want of reasonable care. His Lordship purported to follow the judgment of Romer J. in the *Re City Equitable* case. In that decision, Romer J. was called upon, *inter alia*, to construe a set of articles of association, and in particular, a clause which was in terms similar to the indemnity clause (s. 24) of the Trustee Act, 1893. It was inevitable, therefore, that counsel should rely[49] on the *Re Brier* line of cases, which had impliedly interpreted "wilful default" to include lack of reasonable care, as well as a conscious act of commission or recklessness on the part of the trustee. Romer J. rejected this argument. He pointed out that these cases did not involve a consideration of these precise words and that, in the *Re Brier* line of cases, the court was concerned with the "law as to the employment of agents by trustees."[50] Directors and auditors were not trustees in the strict sense of the word and there is little resemblance between their duties and the "duties of a trustee of a will or a marriage settlement." His Lordship preferred to follow a number of company law decisions, which were authority for a *Derry* v. *Peek*[51] definition of "wilful default."

> "An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."[52]

This definition was later accepted by Astbury J. in *Re Munton*,[53] a decision which was concerned with the liability of a trustee for the acts or defaults of his agent. The learned judge held that a

[48] At p. 582.
[49] *Re City Equitable, loc. cit.*, p. 424.
[50] At p. 439. Maugham J. in *Re Vickery* recognised this distinction but found the exposition of Romer J. of "wilful default" none the less valuable (at p. 583).
[51] (1889) 14 App.Cas. 339.
[52] At p. 434.
[53] [1927] 1 Ch. 262.

retiring trustee was not guilty of a breach of trust in executing a power of attorney authorising a broker to sell stock and receive the purchase price, the broker having, without authority, handed over the proceeds of sale to a co-trustee who had misappropriated them. The reasoning of the learned judge is, with respect, a little difficult to follow. The following passage is significant:

> "The indemnity clauses, containing the exception of wilful default, in the Trustee Acts, may or may not have added anything to the previous law, but in *Re City Equitable Fire Insurance Co., Ltd.*, the whole question of wilful default as regards a fiduciary agent is dealt with at great length. Warrington L.J. says: 'Romer J. was quite right in arriving at the conclusion that a person is not guilty of "wilful neglect or default" unless he is conscious that in doing the act which is complained of, or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, and also, as he said, recklessly careless whether it is a breach of the duty or not. . . .'
>
> "The plaintiff's counsel say that the *City Equitable* case has made no change in the law as regards an ordinary trustee's liability. I do not propose to discuss that. I have read the passage representing the general result of the decision and it seems to me to apply to the present case." [54]

The question was not raised in the Court of Appeal and their Lordships did not comment on these observations of Astbury J.

It is submitted, with respect, that the translation of the definition of "wilful default" in *Re City Equitable* to section 30 (1) of the Trustee Act, 1925, was completely unjustified. Romer J. was construing a particular set of articles of association and the decision on the facts of *Re City Equitable* was to have no application to the case of trustees, *strictu sensu*. This, indeed, was the view of Warrington L.J., in the Court of Appeal, in that case, and his approval of Romer J.'s definition, quoted by Astbury J. in the above passage, was a strictly limited approval. The following extract from the learned Lord Justice's judgment is relevant.[55]

> "With all respect to counsel who cited those trustee cases to us, I think there is great danger of being misled if we attempt to apply decisions as to the duties of trustees to a case as to the conduct of persons in the position of auditors in this case. In the case of trustees there are certain definite and precise rules of law as to what a trustee may or may not do in the execution of his trust, and it is no answer for a trustee to say, if, for example, he invests the trust property in his hands in a security which the law regards as an unauthorised security: 'I honestly believed that I was justified in doing that.' No honest belief will justify him in committing that which is a breach of such a rule of law, and

[54] At p. 274.
[55] *Re City Equitable, loc. cit.*, pp. 523–524.

> therefore the question which we have to determine in expressing a view on the construction of such words in a contract like the present is not solved by seeing how the question has been determined in a case relating to the duties of a trustee."

In effect, neither Romer J. nor the Court of Appeal in *Re City Equitable* intended to derogate from the pre-1926 decisions, which, impliedly if not expressly, interpreted the words "wilful default," within section 24 of the 1893 Act, so as to include lack of reasonable care. Section 30 (1) is a mere re-enactment of section 24 of the Trustee Act, 1893, and like that section should, it is submitted, render the trustee liable if he failed to act with reasonable care.

The delegation sections—a suggested interpretation

It must be remembered, in construing the Trustee Act, 1925, that primarily it "is a Consolidation Act" and that it is "therefore extremely unlikely, to say the least of it, that it effected any substantial change in the pre-existing law."[56] If a literal interpretation of the delegation sections leads to conflict between these sections, then the sections should be narrowly construed in accordance with the pre-1926 law, and, in particular, the principles laid down in *Speight* v. *Gaunt*.

For reasons just set out, it is suggested that section 30 (1) should be regarded as a re-enactment of section 24 of the 1893 Act and interpreted accordingly. Sections 23 (2) and 25 present no great difficulty. They were enacted to meet the case of the trustee being absent from the United Kingdom or where the trust property was abroad, and for these special reasons the trustee is permitted to delegate his discretions. Sections 23 (2) and 25 do not, however, allow the trustee to rid himself of his trusteeship; he should still exercise, as far as is reasonably possible, an anxious surveillance over the trust interests, and his liability for his agent's defaults should be judged by the norm of the reasonable business man, the same standard as is imposed on bankers and solicitors by the proviso to section 23 (3).[57] But what of section 23 (1)? If the *Re Vickery* interpretation is unacceptable, what is the scope of section 23 (1)? The words of the section are sweeping and it is probable that the section does at least remove the limitation imposed on the trustee's power to delegate by the decision in *Ex p. Belchier*[58]—a trustee can now delegate even though there is no legal or moral necessity so to do. In our submission the subsection does no more. A trustee should not, by means of an honest appointment, be able to ignore with complacency the activities of his agent; his liability for that agent's acts or defaults should still be determined by the rule in *Speight* v. *Gaunt* and the norm of the reasonable man of business.

[56] Romer J. in *Re Turner's Will Trusts* [1937] Ch. 15, 24.
[57] *Supra.*
[58] *Supra*, note 2. It is suggested that the *Belchier* principle does not limit ss. 23 (2) and 25.

Such an interpretation would afford meaning to section 23 (1) and would reconcile the section with the remaining delegation sections of the Trustee Act, 1925, and, in particular, section 30 (1).

It must be admitted, however, that section 23 (1) is open to an alternative construction, namely, that the words "in good faith" qualify not only the *act* of employment but the defaults of the agent once appointed. The section, in fact, concludes with the words, that the trustee "shall not be responsible for the default of any such agent if employed in good faith."[59] If this interpretation is given to the section, then section 23 (1) can be reconciled with the other delegation sections only by interpreting "in good faith" restrictively, so as to mean in good faith and without negligence. Eve J. in *Re Greenwood*[60] was required to consider section 21 (2) of the Trustee Act, 1893, and adopted a similar construction. This section, which was concerned with the composition of debts, laid down that the trustee was not responsible "for any loss occasioned by any act or thing so done by him or them in good faith." His Lordship commented upon these words as follows[61]:

> "The question whether that section applies turns mainly on the proper meaning to be attributed to the concluding words of the subsection I have read. They seem to involve the doing of some act, or at least the exercise of some active discretion on the part of the trustee, not the mere passive attitude of leaving matters alone. Inaction . . . cannot be the same thing as 'an act or thing done in good faith. . . .' In determining, therefore, whether the conduct of the trustees has or has not been *bona fide* in any particular case, the court is bound to have regard to all the circumstances, and if these lead to the conclusion that the loss has arisen from the neglect or carelessness or supineness of the trustee, and not from a mistaken but *bona fide* exercise by him of the statutory powers vested in him, then, in my opinion, the case is outside the subsection altogether, and in respect of which no relief is thereby afforded to the trustee."

The Court of Appeal has recently adopted a similar approach in a decision, involving consideration of section 72 of the National Health Service Act, 1946.[62] Such an interpretation is not as radical, therefore, as it may seem at first.

In conclusion, it is to be noted that section 23 (1) speaks simply of the liability of the trustee for the acts of his *agent*, and the section concludes that the trustee shall "not be responsible for the default of any such agent if employed in good faith." The section does not deal with the responsibility, which the *trustee* himself assumed when he undertook the trust. Thus, in *Re Vickery* Maugham J. was concerned with the liability of the trustee for the

[59] *Supra.*
[60] (1911) 105 L.T. 509.
[61] At p. 514.
[62] In *Bullard* v. *Croydon Corporation* [1953] 1 Q.B. 511.

act of the solicitor, and not with the question whether the trustee was in breach of his own *primary* duty as trustee to supervise the trust, and, in particular, his agents. What norm is to determine if the trustee has properly supervised the acts of his agents? The reasonable business man of *Speight* v. *Gaunt*? If this be the standard, and it is suggested that it is, then the decision in *Re Vickery* is effectively circumscribed. The judgment of the trustee must be constantly exercised. To exercise this judgment, as a reasonable trustee should, will demand that the trustee appoints an agent to do work which he is qualified to do, to appoint a solicitor as a solicitor, a broker as a broker[63]; and, after the appointment of such agents, to supervise their acts. A trustee cannot give an agent a carte blanche. This "primary" liability of the trustee is independent of his vicarious liability for the acts or defaults of his agent, and it is with this latter head of liability that section 23 (1) is concerned.[64] It is suggested, therefore, that it is open for the courts to hold that the trustee has a primary duty, imposed on him by equity, to supervise at all times the trust and the trust funds; and it is further submitted that the norm of the reasonable man of business will determine whether in fact he has discharged that duty.

Gareth H. Jones.*

[63] But see Maugham J. in *Re Vickery*, *loc. cit.*, p. 581.

[64] *Cf.* the words of s. 30 (1), which gives the trustee an indemnity, "unless "the same happens through his own wilful default." The master and servant cases in tort are, of course, an obvious parallel: see *Gold* v. *Essex C. C.* [1942] 2 K.B. 293; *Carmarthenshire C. C.* v. *Lewis* [1955] A.C. 549; *Staveley Iron Works* v. *Jones* [1956] A.C. 627. The analogy is only a limited one.

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THE COMMON LAW MARRIAGE

INFORMAL marriages, *i.e.*, marriages contracted merely by consent of the parties, have a long and protracted history. Such marriages were recognised by early canon law and by the common law.[1] They were contracted either by consent *per verba de praesenti* or by *sponsalia per verba de futuro* followed by consummation. *Sponsalia per verba de futuro* created no legal obligations and gave rise to no change of status unless followed by consummation.

The Roman Church continued to recognise such marriages until the so-called "Tametsi" decree of the Council of Trent 1545–63. They were valid unions by English law until Lord Hardwicke's Marriage Act, 1753.[2]

It may seem remarkable that a contract of marriage, which has formidable religious, social and legal significance, should be completed by an informal procedure. The reason is to be found in the Church's desire to regularise cohabitation, to save the children of such unions from the stigma of bastardy and their parents from the sin of fornication. Furthermore, of course, the expectations of the parties at the time of their consent are made good.

Lord Hardwicke's Act called for publication of marriage banns and solemnisation of marriage in the church of the parish wherein at least one of the parties to the marriage resided before a minister and two witnesses and registration of the marriage in the parish register. But it remained possible for a common law marriage, which is the name given to marriages *per verba de praesenti* that do not satisfy the Marriage Acts, to be validly celebrated outside England and Wales. So in *Dalrymple* v. *Dalrymple*,[3] argued before the London Consistory Court, it was held that a marriage contract without religious ceremony was a valid marriage since it took place in Scotland. The evidence of the marriage contract was a paper containing "a mutual promise of marriage" and superscribed "a sacred promise." The court argued that marriage in its origin was a contract of natural law that might exist between two individuals of different sexes although no third party existed in the world "as indeed happened in the case of the common ancestors of all mankind." They took notice of the fact that in most civilised countries acting under a sense of the force of sacred obligations it

[1] For a discussion of the validity of marriages *per verba de praesenti* in canon law and common law, see Pollock and Maitland: *History of English Law*, Vol. II, pp. 368 *et seq.*

[2] 26 Geo. 2, c. 33. This statute applied only to England and Wales and within these countries it had no application to Jews or to Quakers.

[3] (1811) 2 Hag.Con. 54.

had the sanctions of religion superadded and became a religious as well as a civil contract " and since Heaven itself is made a party to the contract it be consecrated by a vow to God," yet the particular marriage before them they held to be validly contracted *per verba de praesenti.*[4]

In the well-known case of *R.* v. *Millis*[5] a marriage was celebrated in Ireland in the house of a Presbyterian minister. There in the presence of the minister the parties entered into a contract according to the religious ceremony prescribed by the Presbyterian Church. Subsequently the parties lived together as man and wife until the husband, during his wife's life, contracted a marriage with another person in a parish church in England. He was indicted for bigamy and hence the courts were required to determine the validity of the earlier marriage. Lords Brougham, Denman and Campbell were of the opinion that the earlier marriage was valid. The Lord Chancellor and Lords Cottenham and Abinger disagreed. They gave it as their opinion that the common law had always required the presence of an episcopally ordained clergyman. Since the Lords were equally divided, judgment was given for the defendant and the validity of the earlier marriage was denied on the operation of the principle *semper praesumitur pro negante.*

Any case which covers some 370 pages cannot be dismissed lightly, but no one can be impressed by the reasoning of those Lords who attempted to distinguish *Dalrymple* v. *Dalrymple.*[6] The defendant was cleared of the charge of bigamy but both he and the innocent wife are stigmatised by what the court held to have been an irregular union. Furthermore the decision really rested on the rule that a negative is preferred to an affirmative in the event of a tie. However, in *Beamish* v. *Beamish*[7] the House of Lords held that the common law of England requires the presence of an episcopally ordained clergyman to constitute a valid marriage.[8] An episcopally ordained clergyman would be a clergyman of the Church of England or a priest of the Roman Catholic Church or (presumably) of the Greek Orthodox Church. The only satisfactory part of *Beamish* v. *Beamish* is the judgment of Lord Cranworth, who specifically left open the effect of marriages of British subjects in colonies or on board ship where there may be no minister of religion. Lord Wensleydale seemed constrained to think such cases would be covered by *R.* v. *Millis.*

4 See also *Collins* v. *Jesson*, 2 Salk. 437; *Wigmore's Case*, 2 Salk. 438; *Lautour* v. *Teesdale*, 8 Taunt. 830.

5 (1843) 10 Cl. & Fin. 534.

6 (1811) 2 Hag.Con. 54.

7 (1861) 9 H.L.C. 274.

8 They went further and held that the rule is not satisfied where one of the parties to the marriage happens to be a clergyman, but that that personage must be an independent third party.

An important judgment is that of Dr. Lushington in *Catterall* v. *Catterall* [9] in the London Consistory Court. The parties married in New South Wales before a Presbyterian minister. The learned doctor found that despite *R.* v. *Millis* there was nothing to prevent the court upholding the validity of the marriage and proceeding to a separation *a mensa et thoro*, notwithstanding that the parties had failed to comply with the local law. He justified his refusal to extend the judgment in *R.* v. *Millis* any further than was absolutely necessary on the unfortunate and unsatisfactory way in which the decision was reached, and further because it would mean "depriving thousands of couples in the Colonies of their right to resort to the Ecclesiastical Courts for redress in cases of cruelty and adultery." For these reasons he held "in this and all other similar cases that, where there has been a fact of consent between two parties to become man and wife, such is sufficient to enable one to pronounce when necessary a decree of separation." [10]

Because of the universality of the canon law and universal acceptance of marriages *per verba de praesenti* there was no conflict before the Council of Trent. There seems to be little authority before *Scrimshire* v. *Scrimshire*,[11] which favours the form required by the *lex loci celebrationis*. If anything what authority there is might suggest that if British subjects marry according to English form the marriage will be recognised in an English court. Further, if we accept the earlier thesis in support of the validity of the common law marriage no difficulty will arise unless the actual consent of the parties is questioned.

Neither *Scrimshire's* case nor *R.* v. *Millis* have been accepted *in toto*. The rule in *Scrimshire's* case is a fair one based on the presumption that the parties can always ascertain the correct local forms. But were the rule to operate in cases where the parties were unable to comply with local form it would not be a fair rule.[12] The rule in *R.* v. *Millis* has been rejected as a rule of the Conflict of Laws.[13]

In 1795 the inhabitants of the Cape of Good Hope surrendered to the British forces on terms "that the inhabitants of the Cape should preserve their prerogatives and the exercise of public worship that they at present enjoy." The laws of the United

[9] (1847) 1 Rob.Ecc. 580.
[10] *Ibid.*, p. 533.
[11] (1752) 2 Hag.Con. 395.
[12] The rule in *Scrimshire* v. *Scrimshire* that the parties must comply with local form has been very much limited by the Foreign Marriages Act, 1892, both as regards marriages within foreign embassies and consulates and also marriages within the lines. See Dicey, 7th ed., pp. 230 *et seq.*, and also *Bailet* v. *Bailet* (1901) 17 T.L.R. 317. We are here concerned with its limitation by application of the common law rule that marriages *per verba de praesenti* are valid.
[13] See below: *Wolfenden* v. *Wolfenden* [1946] P. 61.

Provinces which were in force at the time were neither repealed nor altered. A marriage celebrated by the chaplain of the British Forces after the capitulation was held valid though not conforming to the local law: *Ruding* v. *Smith*.[14] The decision was based on a number of grounds, *viz.*, the distinct British character of the parties; their independence of Dutch law in their own British transactions; on the countenance given by the British authorities; upon the whole country being under British dominion. The decision lends support to *Caterall* v. *Caterall*,[15] and followed *Dalrymple* v. *Dalrymple*.[16] It should be noticed in passing that the court based its decision not on the impossibility of complying with the local rules but on the fact that a religious ceremony would be essentially different from the parties' own religion and the judgment was illustrated by a comparison with Englishmen marrying in Lisbon, Cadiz, Aleppo or Smyrna.

It would seem that Dicey, 7th ed., p. 231, is wrong in saying that until the middle of the nineteenth century compliance with the *lex loci celebrationis* seems to have been the sole criterion both of formal validity and capacity to marry. Further, *Ruding* v. *Smith* seems to suggest that the common law form is available not only when it is impossible to comply with local form but also when that local form is offensive. Thus not only when the local form is not recognised by English law [17] but also if it is offensive to the parties not because of the character of the marriage which results from it but because of the very nature of the marriage ceremony itself. So in *Philips* v. *Philips* [18] the common law form was held to constitute a valid marriage since it was impossible to comply with the Foreign Marriages Acts, and as China was a non-Christian country the local law of China was inapplicable. The actual ceremony in this case took place in a church hall, an unlicensed building, before a priest of the Church of England following publication of the banns of marriage.

In *Wolfenden* v. *Wolfenden* [19] there was no prior notice of intended marriage. The marriage itself was unlicensed and took place before a minister of the Burgess Church of the Church of Scotland Mission in the Province of Hupeh in China. Hupeh was held not to be a district to which the Foreign Marriages Act could be extended and the union was held to be a valid common law marriage.

The justification for the decisions in these cases seems to be the principle that although colonial settlers take the law of England with them to their new home, they only take so much of it as is

[14] (1821) 2 Hag.Con. 371.
[15] See above, n. 9.
[16] (1811) 2 Hag.Con. 54.
[17] *Re Bethel* (1887) 38 Ch.D. 220.
[18] (1921) 38 T.L.R. 150.
[19] [1946] P. 61. See also *Maclean* v. *Cristall* (1849) 7 Notes of Cases, Suppl. 17, 24–25.

applicable to their situation and condition. Hence in many situations they cannot comply with primitive local forms nor with the English statutory requirements, nor with the common law rule of *R.* v. *Millis*.

The question arises and so far remains unanswered whether the marriage must be as near as possible to the requirements of English law, including *R.* v. *Millis*, or merely a common law marriage in accordance with the sole requirement of consent *per verba de praesenti* and sufficient evidence of that consent. Usually the parties can be counted on to adopt their mother code—thus even in *Wolfenden* v. *Wolfenden* the parties obtained the services of a minister.[20] But what is the position when the parties could satisfy the Foreign Marriages Acts if they wished but in fact they celebrate their own marriage *per verba de praesenti*? What is the position when by simply travelling a few miles they could satisfy the requirements of *R.* v. *Millis*? The answer to this last question seems to rest on the question of whether *R.* v. *Millis* has no application outside England, Wales and Ireland or whether it has application but not when it is impossible to obtain the services of a clergyman. Lord Cranworth in *Beamish* v. *Beamish* [21] seemed to favour the latter view. Further authority for this view can be found in *Du Moulin* v. *Druitt*.[22] In this case a stowaway was ordered by the commanding officer of a troopship to marry one of the soldiers on board. The court invalidated the marriage following *R.* v. *Millis* and holding that it was not a matter of necessity. Of course the short answer is that there was no real consent and therefore no common law marriage, valid or otherwise, but the court did not see fit to adopt this approach.

It would appear from *Wolfenden* v. *Wolfenden* that the first proposition is correct and that *R.* v. *Millis* has no operation abroad, for in *Wolfenden's* case the parties could have travelled to an appropriate locality. It seems that severe inconvenience will at any rate excuse the parties from procuring a clergyman. But supposing that although it is impossible to satisfy the local forms they can marry according to the provisions of the Foreign Marriages Act. Can they celebrate a valid common law marriage in such a situation? We will return to this question later.[23]

It can be expected that English courts will demand a high standard of proof before they will accept that there has been a valid marriage *per verba de praesenti*. Subsequent cohabitation may be in itself sufficient. Since there is a presumption operating in such circumstances in favour of a marriage when the parties themselves are unable to give evidence, it may well operate when they are unable to give conclusive evidence. Usually there will be

[20] Not an episcopally ordained clergyman, however.
[21] (1861) 9 H.L.C. 274, at p. 348.
[22] (1860) 13 Ir.C.L.R. 212.
[23] Below, p. 406.

ample proof in the form of witnesses present at the proceedings. Thus in the case of *Isaac Penhas* v. *Tan Soo Eng*,[24] the marriage between Abraham Penhas and Tan Soo Eng (both British subjects) took place in a private house in Singapore. It was celebrated by an aged Chinese gentleman, introduced by Penhas, who himself nevertheless worshipped in the Jewish faith while his wife followed Chinese rites. The only conclusive thing arising out of the whole ceremony (and undoubtedly the only thing comprehended by all present) was the consent signified by handshaking. The Privy Council held that it was neither convenient nor necessary that two persons of different religions should be called upon to marry before an episcopally ordained priest. They further held that the resultant union was a common law monogamous marriage and not a Chinese polygamous marriage.

The case was fully argued before the Privy Council and it is interesting to note how in part the arguments resemble those in *R.* v. *Millis*. Thus counsel for the appellant argued that " It would be a disaster if the rule in *Maclean* v. *Cristall* were established, it would revive clandestine marriages and would strike ruthlessly at the marriage systems of the natives which they have devised for the protection of their community life." [25] But the Judicial Committee preferred to follow *Wolfenden*:

> ". . . in a country such as Singapore, where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to effect a marriage." [26]

Common Law Marriages Between Non-British Subjects

In *Savenis* v. *Savenis & Szmeck* [27] the Supreme Court of South Australia had a novel case to deal with. It concerned a Lithuanian P.O.W. imprisoned in Bavaria. On November 1, 1945, he went through a ceremony of marriage before a Roman Catholic priest, but failed to comply with the local requirement of a civil ceremony. His petition for divorce was uncontested and as a preliminary the court found the marriage valid in point of form as a common law marriage. Fleming makes the point [28] that it seemed by no means conclusively proved that it would have been impossible to obtain a registrar and so comply with local law and further the parties might have delayed awhile until repatriation. The case seems to suggest that mere difficulty or inconvenience may be sufficient to

[24] [1953] A.C. 304.
[25] *Ibid.*, 315.
[26] *Ibid.*, 319.
[27] [1950] S.A.S.R. 309.
[28] 4 I.L.Q. 500.

justify a court in overlooking the non-compliance with local form and recognising a valid common law marriage.

What is more important is the application of the *lex fori* as the law governing formality. Presumably the justification for applying any law to determine a change of status such as is involved in marriage is the close connection between the parties and the law applied. The possibilities are three in number: (i) the *lex loci celebrationis*, (ii) the *lex domicilii*, (iii) the law of the matrimonial home. It has long been held that persons should comply with the first named, but English courts have also for a long time held in certain circumstances that the parties may comply with the *lex domicilii*.[29] But in this case Mayo J. went so far as to apply the *lex fori* to determine the validity of the marriage form and held it to be a proper common law marriage.

Some doubt is cast on the authority of *Savenis* v. *Savenis & Szmeck* by the subsequent decision of the South Australian court in *Fokas* v. *Fokas*.[30] Here in a wife's action for a declaration of nullity of marriage it was proved that the wife and husband were born and originally domiciled in Lithuania. Whilst in a "displaced persons" camp in Germany they were married according to the ritual of the Roman Catholic Church and no subsequent civil ceremony took place. The court held simply that the marriage had not been celebrated in accordance with the *lex loci celebrationis* and accordingly it was null and void. Napier C.J. expressed considerable doubt as to the correctness of the decision in the *Savenis* case. His view has been further strengthened by the decision of Myers J. in the Supreme Court of New South Wales in *Maksymec* v. *Maksymec*.[31] The learned judge expressly pointed out the absence of any connecting factor, nationality, residence or domicile at the time of the celebration, and concluded that it would be most unjust to apply the *lex fori*.

The straightforward answer is for the courts to grant a decree of nullity, but this has the unfortunate effect of branding the union as irregular and the children as illegitimate. One can appreciate the court's desire to uphold the marriage, but are they not in danger of going too far?

In two recent cases[32] the English courts have been asked to deal with similar situations. Like the Australian cases these presented a novel problem. The only authority which the English courts could rely on to any extent was *Berthiaume* v. *Dastous*.[33] Had they relied on this decision they would have been guided to

[29] *e.g.*, *Ruding* v. *Smith* (1821) 2 Hag.Con. 371; *Bailet* v. *Bailet* (1901) 17 T.L.R. 317.
[30] [1952] S.A.S.R. 152.
[31] (1956) 72 W.N.(N.S.W.) 522.
[32] *Taczanowska* v. *Taczanowski* [1957] P. 301; *Kochanski* v. *Kochanska* [1958] P. 147.
[33] [1930] A.C. 79 (P.C.).

the opposite conclusions to those which they in fact reached. In *Berthiaume* v. *Dastous* the parties were domiciled in Quebec and their marriage, solemnised in France according to the rites of the Roman Catholic Church but without a civil ceremony, was a nullity under French law. The Privy Council recognised the firmly established principle *locus regit actum* and refused to declare the marriage valid, though had the ceremony been conducted in Quebec it would have been considered a good marriage.

In *Taczanowska* v. *Taczanowski*,[34] the parties to the marriage were Polish nationals. The husband was a member of the Polish Second Corps serving in Italy. The parties were married before a Polish army chaplain according to the rites of the Roman Catholic Church. The ceremony did not satisfy local Italian form. Karminski J., after satisfying himself that the marriage did not satisfy the formalities required by the *lex loci celebrationis*, introduced the concept of *renvoi* into the law governing the formation of a marriage [35] and accepted the transmission to Polish law, having ascertained that an Italian court would have done so if seised of the problem. Unfortunately the marriage did not satisfy the requirements of Polish law.

Finally Karminski J. considered the case of *Savenis* v. *Savenis & Szmeck* and the possibility of upholding the marriage as one *per verba de praesenti*. He found nothing in Lord Stowell's judgment in *Ruding* v. *Smith* [36] to prevent an extension of the doctrine of the common law marriage to foreigners.

> "There can be no doubt in the light of decided cases that when a marriage by the *lex loci* is impossible, or at least objectionable to the conscience, marriage in the common law form will be recognised by the courts of this country . . . . But assuming the parties have brought their own personal law with them, it would be Polish not English law and, for the reasons given above, this form of marriage would not be recognised as valid by Polish law as it stood at the time of the ceremony." [37]

Later on Karminski J. refused to express any opinion on the correctness of *Savenis* v. *Savenis & Szmeck* though he admitted that a decision of Mr. Commissioner Latey Q.C. in *Pilinski* v. *Pilinska* [38] seemed at variance with it. It is submitted that

[34] [1957] P. 301.

[35] Whilst the doctrine of *renvoi* has been the subject of considerable criticism, one can observe the obvious justification in applying it in circumstances whereby it might uphold the marriage. The rule by which courts are directed to look to the *lex loci celebrationis* is not an absolute one according to which the parties must satisfy local law, but rather it is a convenient rule to assist them in obtaining a satisfactory form of ceremony which will be universally recognised. If the local forum is prepared to accept another law (such as the personal law of the parties) the English court is justified in adopting the practice of the marriage forum as its own.

[36] See above, note 29.

[37] [1957] P. 312.

[38] [1955] 1 W.L.R. 329.

Karminski J. was right in looking to the personal law of the parties as an alternative to the *lex loci celebrationis* where it is impossible to follow the local law or where it is offensive or objectionable to the parties. But the Court of Appeal did not adopt this view.[39] They upheld the union as a common law marriage. But to apply English law as the *lex fori* is to create marriages in the eyes of English law that elsewhere do not stand as marriages. The purpose of the rules of the conflict of laws is to avoid conflict, not to create it. The principle of *Ruding* v. *Smith*[40] is that individuals accompanying a conquering army cannot be subjected to the laws of the conquered country; therefore we apply their personal law. So also individuals in uninhabited parts are entitled to celebrate marriages according to their personal law.[41] On the other hand it cannot be disputed that a very strong Court of Appeal[42] were unanimous in their decision. Hodson L.J. seems to have based his judgment on the universality of the common law principle *consensus non concubitus facit nuptias vel matrimonium* from which the common rule developed. But this principle had no general application after the Council of Trent and the common law marriage is a feature peculiar to our system.

The Court of Appeal decision was followed by Sachs J. in *Kochanski* v. *Kochanska*.[43] He had to decide on the validity of the marriage as a preliminary to the hearing of a divorce petition. He found that the parties, who were both domiciled Polish nationals, as prisoners of war in Germany and subsequently as displaced persons at a camp in Nordheim could not be said to have subjected themselves to German law and that the rule that the formalities of marriage are governed by the *lex loci celebrationis* is based on the presumption that the parties had subjected themselves to that law. It is significant that in this case, as in *Taczanowska* v. *Taczanowski*, it would have been possible for the parties to comply with local forms, but Sachs J. thought it was open to the English court to apply English common law rules and accordingly upheld the validity of the marriage. The case is made more significant still by the fact that counsel for the petitioner did not press the point that the marriage between the two parties was valid by their personal law, though clearly it was. Furthermore, Sachs J. recognised that it was valid by Polish law, but agreed that the issue of validity depended on the union satisfying the principles of common law. This seems a strange conclusion for the courts to reach in view of the fact that they relied extensively on *Ruding* v. *Smith*[44] and *Wolfenden* v. *Wolfenden*[45] which both stress the fact that failing

[39] [1957] P. 314.
[40] See above, note 29.
[41] *Wolfenden* v. *Wolfenden* [1946] P. 61.
[42] Hodson, Parker and Ormerod L.JJ.
[43] [1958] P. 147.
[44] (1821) 2 Hag.Con. 371
[45] [1946] P. 61.

the application of the *lex loci celebrationis*, the English courts will apply the common law *qua* the personal law of the parties and not *qua lex fori*. Parker L.J. in *Taczanowska* refused to look to the law of the domicile of the parties and pointed out that difficulties would arise in cases where the spouses had different domiciles. But this is precisely what we do in problems of capacity and it would work no great injustices in the case of formalities. At the outside the courts might turn for aid to the law of the intended matrimonial domicile to save what may otherwise be an invalid union, but the application of the *lex fori* is arbitrary, and a marriage will stand or fall on mere chance according to the choice of forum. These difficulties have been referred to in a recent case note.[46]

A further comment may be made on these cases. Karminski J. at first instance in the *Taczanowska* case noticed that the argument which eventually prevailed in the Court of Appeal seemed contrary to the decision in *Pilinski* v. *Pilinska*.[47] In this almost identical case the parties married in a Roman Catholic Church and failed to comply with the local requirements of a civil ceremony. A subsequent decree promulgated under the authority of the Allied Control Commission validated retrospectively such marriages if they were duly registered. The marriage not having been registered Mr. Commissioner Latey held it to be null and void. He cited *Berthiaume* v. *Dastous* and so far as may be ascertained from the report no attempt was made to uphold the union as a valid common law marriage. The learned commissioner relied on the earlier case of *Starkowski* v. *Attorney-General*.[48] In this case the House of Lords recognised a similar marriage which had been registered to have been retrospectively validated by legislation of the Austrian Government providing for registration of such marriages. If the decisions in *Taczanowska* and *Kochanski* are regarded as correct then clearly there was no reason for the Law Lords to review the Austrian legislation and the subsequent registration, for without such legislation the marriage should have been held to be a common law union. However the Lords did not take this view and it is clear from the reports that had the subsequent registration not been given retroactive effect they would have regarded the marriage as null and void.

It has been suggested [49] that the decisions in *Taczanowska* and *Kochanski* are limited to marriages of members of belligerent forces. It is to be hoped that the principle will not be extended, but on the other hand this would be an arbitrary restriction. Once we

[46] Webb, 21 M.L.R., p. 91, who notes that the decision in *Kochanski* v. *Kochanska* may open the way to possible fraud if we allow the parties to show their intention was not to marry under the *lex loci* and apply common law requirements.

[47] See above, note 38.

[48] [1954] A.C. 155.

[49] *Dicey*, 7th ed., p. 241, but *Savenis* v. *Savenis & Szmech* concerned civilians.

admit that we will recognise common law marriages between foreign subjects in one situation there appears to be no reason to stop there and logically it should be extended to all cases where the parties are unable to comply with local law or have not voluntarily subjected themselves to the local law. The truth is that there is little justification for applying the common law to foreign subjects marrying abroad, whatever the circumstances may be.

Conclusions

As far as can be ascertained from the decided cases the English courts will recognise a valid common law marriage in the following circumstances.

1. A common law marriage abroad between British subjects domiciled in England or Wales at the time of the marriage may be valid when *either* there is no local form *or* the local form is inapplicable *or* the local form is in some way objectionable or offensive to the standards of English civilisation or to the religious beliefs of one or both of the parties *or* the parties cannot be said to have subjected themselves to local law—this latter is deduced from the rules applicable to marriages between foreign subjects.

The cases point to the fact that the common law requirements are applied to these marriages because it is the personal law of the parties; therefore it may seem logical to argue that if the parties could have satisfied the requirements of the Foreign Marriages Act, 1892, they will not be entitled to claim that their formless union is a valid common law marriage.[50] However, if this is so, British subjects are in a less favourable position in the eyes of the English courts than foreign subjects who may ignore the requirements of their personal law. There is undoubted justification in arguing therefore that they should be given the same leniency as foreign subjects to marry in such situations. This might appear at first sight to mean a significant disregard for the Foreign Marriage Act but it is expressly enacted in section 23 of the Act that:

> " Nothing in this Act shall confirm or impair or in any wise affect the validity in law of any marriage solemnised beyond the seas otherwise than as herein provided, . . ." [51]

2. Marriages abroad between foreign subjects domiciled in England or Wales at the time of the marriage are presumably governed by the same principles since English law is their personal law.

3. Marriages abroad between foreign subjects domiciled abroad at the time of the marriage and not nationals or domiciliaries of the marriage forum may be valid common law marriages when there

[50] Schmitthoff, 3rd ed., p. 322, favours this view.

[51] 55 & 56 Vict. c. 23 (Foreign Marriage Act, 1892), s. 23. This view is supported by the judgment of Lord Merriman in *Wolfenden* v. *Wolfenden* [1945] 2 All E.R. 539 at p. 543.

is *either* no local form *or* the local form is inapplicable *or* the local form is in some way offensive to their own standards or religious beliefs *or* the parties cannot be said to have subjected themselves to the local law.

Common law requirements are applied to these marriages because the common law is the law of the forum. The requirements of their personal law are irrelevant. Exceptionally a marriage invalid by the *lex loci* and by English common law may be valid by the personal law. It is still open to the courts in this situation to apply the personal law to uphold the marriage, despite the judgment of Sachs J. in *Kochanski* v. *Kochanska*.

4. Where the marriage is celebrated abroad between foreign subjects who are either nationals or domiciliaries of the marriage forum it is more difficult to give an answer. Very rarely are the parties likely to satisfy the requirements of a common law marriage, though *Isaac Penhas* v. *Tan Soo Eng* [52] is a case where domiciliaries and nationals of the marriage forum contracted a valid common law marriage. An extension of this principle to marriages in a foreign country between nationals and domiciliaries of that country would be a most unhappy action, though it would seem to be a logical step following *Taczanowska* v. *Taczanowski*. This is itself a very valid criticism of that case and a good reason for hoping, as Dicey suggests, that the operation of the rule in *Taczanowska* v. *Taczanowski* is confined to prisoners of war or displaced persons who find themselves forced to remain in foreign territory for a period of time.

5. We must assume that marriages abroad between British subjects domiciled abroad at the time of the marriage may be valid common law marriages if they satisfy those rules applicable to foreign subjects domiciled abroad.

J. A. Andrews.*

[52] [1953] A.C. 304. It will be remembered that the parties were British subjects domiciled and resident in Singapore. No local form was applicable to both parties and it was held that nothing prevented them contracting a common law monogamous marriage.

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STATUTES

Terms and Conditions of Employment Act, 1959

This is the most important enactment concerning the enforcement of collective agreements ever to have been passed by Parliament. It has had a very curious legislative history. The original title of the Bill was "Wages Councils (Amendment) Bill," and its purpose was to repeal the Catering Wages Act, 1943, and thus to abolish the Catering Wages Commission and to convert the existing catering wages boards into wages councils under the Wages Councils Acts, 1945 and 1948. Besides, it was designed to introduce a number of important but highly technical changes in the Wages Councils Acts.

While the Bill was pending, the Industrial Disputes Order, 1951, was revoked by the Industrial Disputes (Amendment and Revocation) Order, 1958, the Industrial Disputes Tribunal was abolished, and the compulsory arbitration of disputes came to an end. The Government was, however, anxious to continue the "issues" procedure under what had been Article 2 of the Industrial Disputes Order, and it appears that the employers' representatives agreed with this policy. The trade unions were perhaps not very interested in this matter, but finally the Ministry of Labour succeeded in producing an agreement to continue in modified form this "issues" procedure. It is the well-known policy of the present Government to abrogate the still existing Defence Regulations (a policy expressed in the Emergency Laws (Repeal) Act, 1959), and they were therefore looking for an opportunity of introducing a provision to continue the "issues" procedure in the form of a Bill before Parliament rather than a Statutory Instrument. It so happened that what was then called the Wages Councils (Amendment) Bill was still pending, and an additional clause (now s. 8) was added for the purpose of dealing with what had been the "issues" procedure. Seeing that obviously this clause 8 was very much more important than anything else in the Bill, the Bill was re-christened and called the "Terms and Conditions of Employment Bill" and this has now received the Royal Assent.

It is not intended to deal here with anything in the Bill outside section 8. There is little to be said about the disappearance of the Catering Wages Act. It does not of course mean that minimum wage regulation has disappeared from the catering industry, but only that the catering wages boards have become wages councils, and that the creation of new councils as well as the abolition of existing ones will be governed by the Wages Councils Acts as amended by the present statute.

The importance of section 8 is not that it introduced anything startlingly new. The principle that employers can be made to observe "recognised terms and conditions of employment" goes back to the passing of the Conditions of Employment and National Arbitration Order, 1940, Article 5, and has had an uninterrupted history ever since. Under the Orders of 1940 and 1951 the Tribunal, which was originally called the National Arbitration Tribunal and subsequently the Industrial Disputes Tribunal, had jurisdiction in this matter. This jurisdiction now vests in the Industrial Court, this being one of the very exceptional cases in which that tribunal has compulsory powers which of course it has not under the Industrial Courts Act, 1919. The important thing about the new section is that what hitherto has appeared as an emergency measure has now become a permanent feature of the law. It should be noted that collective agreements as such have not been made enforceable by this new enactment any more than they were under the previous emergency legislation. The principle established by the Court of Appeal in *Hulland* v. *Sanders*,[1] that nobody can derive a direct claim under a collective agreement in virtue of this legislation, remains valid. If an employer fails to observe "recognised terms and conditions" the case can be reported to the Ministry of Labour. The Minister "may take any steps which seem to him expedient to settle, or to secure the use of appropriate machinery to settle, the claim." If he fails, he must refer the matter to the Industrial Court. The Industrial Court may find that the terms and conditions which the employer is observing are not less favourable to the worker concerned than the "recognised terms and conditions." It appears from the new section 8 (3) that in that case the Industrial Court will not make an award. But if it does not find that this is the case it must make an award "requiring the employer to observe the recognised terms or conditions as respects all workers of the relevant description from time to time employed by him." It will be seen that essentially this is a continuation of the "issues" procedure under the Industrial Disputes Order, but in a number of respects the present Act has either clarified or modified the law:

(a) It is quite clear now that the "claim" (this word has replaced the old word "issue") can be made even if only one worker is concerned. This is not an innovation, but a statutory affirmation of the interpretation of the previous order by the courts.[2] If, however, the matter has been referred to the court, the award of the court will cover not only the individual worker whose treatment by the employer gave rise to the claim, but all workers of the relevant

[1] [1945] K.B. 78.
[2] *R.* v. *Industrial Disputes Tribunal, ex p. Practical Banking Co.* [1952] 2 Q.B. 662.

description from time to time employed by that employer. Workers of the relevant description are those to which the recognised terms and conditions relate, in the geographical as well as in the occupational sense.

(b) It is made clear through the formulation of section 8 (1) (*c*) that it does not matter whether the employer concerned is or is not a member of an organisation party to the agreement or award establishing the recognised terms and conditions. As hitherto, the procedure applies to "outsiders" as well as "insiders," although no doubt the cases coming before the Industrial Court will be cases of outsiders only. How far this procedure assists employers' associations in enforcing the necessary discipline as regards "insiders" is not a matter on which it is easily possible to obtain reliable information.

(c) The first proviso to section 8 (1) makes it clear that all those workers who came under the Wages Councils Acts or the Agricultural Wages Acts are outside the procedure under the section. The minimum wage legislation and the indirect enforcement of collective agreements are now mutually exclusive.

(d) Section 8 (4) says that an award shall have effect as an implied term of the contract of employment. This is the same as under the previous law. The new law makes it clear, however, that this effect continues until "the coming into operation of an agreement or award varying or abrogating the recognised terms or conditions." This formula eliminates one of the worst deficiencies of the Industrial Disputes Order whose Article 10 was ambiguous. What the new law makes clear is that by a contract between individual employer and employee the effect of the award cannot be terminated.[3] This can only be done by agreement between the collective parties or by an award rendered in proceedings between them.

The policy which has found expression in this enactment can be compared with that which, in various Continental countries such as France, Western Germany, Switzerland and the Netherlands, has led to a power vested in the appropriate authority to extend the effect of collective agreements to employers who are neither parties nor members of parties to such agreements. The policy is similar, but the technique is different in that an examination of the case on the merits, first by the Industrial Relations Department of the Ministry of Labour, and secondly by the Industrial Court, must have taken place before this effect is produced. It is very

[3] The Industrial Disputes Order was open to this interpretation: see *per* Denning L.J. in *R.* v. *I. D. T., ex p. Portland Urban District Council* [1955] 1 W.L.R. 949, at p. 955.

characteristic of the British as compared with the general Continental approach to these matters that an attempt at settlement must in the first place be made by the Minister, and that the ultimate sanction cannot be applied except after proceedings in a judicial form. It can perhaps be expected that most cases will be settled, and the number of actual awards made by the Industrial Court is not likely to be very large.

If one criticism can be levelled against this new enactment it would be that like its predecessors it failed to make the services of the minimum wage inspectorate (which enforces the Wages Councils Acts) available for the enforcement of awards rendered by the Industrial Court.

O. KAHN-FREUND.

FAMILY ALLOWANCES AND NATIONAL INSURANCE ACT, 1959

SECTION 43 of the National Insurance Act, 1946, empowers the making of regulations for the determination of claims and questions under that Act and provides for the procedure by way of insurance officer, local appeal tribunal and Commissioner.

The Ministry of Pensions and National Insurance stated in evidence to the Franks Committee [1] that if the family allowances scheme under the Family Allowances Act, 1945, were now to be introduced for the first time, they would be inclined to adopt the national insurance structure. The Franks Committee recommended that this change should be made.[2] Section 1 of this Act of 1959 implements this recommendation by applying section 43 of the Act of 1946 to the determination of any question as to the right to a family allowance—except that the Minister is to continue to determine questions under the Schedule to the Act of 1945 (that is, certain questions as to which of two persons is to be treated as maintaining a child, or in which of two families a child is to be treated as included). This section 1 includes various consequential provisions and excludes the supervisory function of the National Insurance Advisory Committee for regulations made under it.

Section 2 of the Act of 1959 provides for an appeal to the Industrial Injuries Commissioner from any decision of a medical appeal tribunal on the ground that the decision is erroneous in point of law, after leave has been given by the tribunal or the Commissioner. The tribunal may refer any question of law to the Commissioner for his decision. This section is to come into force on a date appointed by the Minister. In *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [3] it had been held that certiorari would lie to correct an error of law on the face of the record of this

[1] Days 1–2, p. 41.
[2] Cmnd. 218, para. 184.
[3] [1957] 2 W.L.R. 498.

tribunal although the Act stated that the decision of the tribunal was final. This section 2 gives a wider statutory remedy and has the almost certain effect that the courts would now refuse leave to move for certiorari, at least until that remedy was exhausted.

Section 47 of the National Insurance (Industrial Injuries) Act, 1946, provided that no appeal should lie from a local appeal tribunal to the Commissioner without leave of the tribunal or Commissioner. Section 3 of the Act of 1959 removes this requirement of leave. This follows a recommendation of the Franks Committee.[4]

J. A. G. Griffith.

[4] Cmnd. 218, para. 177.

REPORTS OF COMMITTEES

A Further Comment on the Fourth Report of the Private International Law Committee (Formal Validity of Wills)

The question of formal validity of wills is of such vast importance to legal practitioners that it may be permissible to add to, and in part to oppose, the considerations set forth in Dr. J. H. C. Morris' learned note in this *Review*.[1]

The Committee proposes to give to every testator the choice between three legal systems:

(a) the *lex loci actus*,

(b) the *lex domicilii*,

(c) the law of his or her nationality.

This is not a new idea. Nor is it one that is untried in Europe. What the Committee proposes has been the law in Switzerland since the Statute on the Private Law Relations of Swiss Residents and Sojourners in Switzerland of June 25, 1891.[2] The practice of the Swiss courts during the past sixty-eight years has shown that no serious difficulties are encountered in the administration of the rule. It is a little surprising that the Committee did not refer to this precedent.

Dr. Morris expresses the hope that the proposal permitting the choice of the nationality principle "will be dropped because it is out of harmony with common law principles of the conflict of laws." Private international law is, however, a matter of convenience and justice rather than of traditional principles. Convenience and justice render it most desirable that the law of nationality should be one of the choices open to a testator. Without its inclusion numerous wills made by British subjects residing abroad would necessarily be rendered ineffective, with the deplorable result that a foreign law of intestate succession would apply—quite contrary to the testator's wishes. The inclusion of the law of nationality is furthermore required by way of adjustment to the fact that this principle applies very largely throughout Europe. A testator possessing the nationality of X, being domiciled in Y, not holding any property there but owning assets in this country, should not be compelled to make a will in accordance with the law of Y.

Whether, as Dr. Morris expects, the Canadian Government will regard the Committee's proposals as an improvement of their own

[1] (1959) 22 M.L.R. 65 *et seq.*

[2] For an English translation of all relevant sections, see Nussbaum, *American-Swiss Private International Law* (Bilateral Studies, No. 1, Parker School of Foreign and Comparative Law) (2nd ed., 1958), pp. 79 *et seq.*

law would hardly seem relevant: our problem is vastly different from theirs. One of our tasks is to strive for some form of accommodation to European conditions. As long as the nationality principle holds sway in most European countries, the Committee's view will prove to be beneficial in very numerous cases.

The Committee has in one respect gone beyond the Swiss precedent. They have permitted to a land-owning testator the choice of a fourth legal system by allowing him to adopt the form of the *lex situs* of the land in so far as his will disposes of it. Presumably this is merely an abbreviated form of speech: the further alternative is probably intended to apply not merely to land, but to any form of immovable property. While Dr. Morris deplores the return by the back-door of the concept of nationality, in the present writer's view the return by the back-door of the unfortunate scission principle is to be deplored. This principle was condemned no less than 110 years ago by Savigny.[3] It should find no place in contemporary legislative measures. But this does not mean that the Committee's suggestion does not contain a kernel of truth. The *lex situs* is indeed of paramount importance in connection with all questions of succession. This, however, is not merely true of immovable property. It is true of any form of asset. In other words: in the present writer's view the Committee's proposal, now confined to land, should be extended so as to cover any form of property.

This suggestion may on its part be received with the exclamation that it is startling and departs from all traditional canons—not only those of English law. But the unprecedented shrinking of distances in the modern world, the number of migrations and the fact that in our times virtually all legal systems provide for adequate forms of wills may excuse the suggestion of an innovation. If a testator possessing the nationality of X, being domiciled in Y and making his will in Z, had all his assets invested in England, he should be allowed to make his will in accordance with English law. And if he made his will in accordance with English law his will should not be defeated on the ground that it does not correspond to the rules of form of three other countries where he did not leave a single penny. Legal advisers consulted by testators are often in no little difficulty in regard to the question of the proper form of a will. The *lex domicilii* is sometimes not easy to establish. The *lex patriae* is in numerous cases no more certain. The *lex loci actus* is as a rule the best choice, but it is a fact that many testators wish to make a will just before going on a journey or that they write home to their legal advisers from some station on a journey, which they have already begun, asking for the draft of a last will. In such cases the *lex loci actus* offers no way out. It is submitted that it is reasonable that a testator should be allowed to make a will in accordance with the rules of that legal system by which his estate

[3] *System des heutigen römischen Rechts*, Vol. VIII (1849), p. 356; see E. J. Cohn, "The form of wills of Immovables" (1956) 5 I.C.L.Q., pp. 394 *et seq.*

is going to be administered, *i.e.*, the law of the *situs* of his assets. In this connection it will be remembered that an English grant is of as little use on the European Continent as a European "certificate of inheritance" in this country. Separate proceedings for English grants and for foreign certificates are therefore nearly always required. Would it not eliminate numerous difficulties if a testator could make his will in accordance with the law of the place where the proceedings have to be started—whether for a grant or for a certificate—and if he would not be compelled to prove to the court that his will is valid by a system which from the point of view of the court is "foreign"?

Dr. Morris castigates the Committee for its suggestion that other Commonwealth countries should be invited to consider the Committee's proposals, that these should be brought before the next Hague Conference on Private International Law and that their introduction in this country should be deferred until after the conclusion of the Conference. This criticism is not well founded. The next Hague Conference will take place very soon. H.M.Government's proposals, if following the Committee's pattern, will supply a much-needed practical stimulus. It is perhaps hoping too much, if one were to expect that they will be adopted in their entirety. But the Committee does not say that the introduction of its suggestions in this country should be made dependent upon their acceptance by the Conference.

Uniformity of the rules as to the form of wills at least within Europe is not only most desirable, but has become a matter of urgency. It might be attained by advocating a simpler proposal, either as an alternative or, better still, as a supplement to the Committee's suggestions: any will made anywhere in the world (or at least within Europe) should be deemed to be valid as to form if it is made before, and attested by, a notary public. Such a proposal may seem startling to English lawyers who do not remember the time-honoured part that the notarial profession has for centuries played on the Continent of Europe. But it would have two most important advantages: it could not be easily drowned in the flood of theoretical or pettifogging considerations that have marred some of the deliberations of Hague Conferences in the past. And it could be learned and kept in mind easily by the most simple-minded student and will therefore be remembered by those practitioners who do not specialise in private international law in the hour when they are called upon to practise their learning.

E. J. Cohn.

NOTES OF CASES

The Yarn-Spinners' Agreement: Economics in Court

The second judgment of the Restrictive Practices Court is momentous.[1] Its condemnation of the minimum price agreement of the Yarn Spinners' Association has already led to the abandonment of several restrictive agreements in other industries. For, rightly or wrongly, the decision has been taken to mean that the court will only in rather special cases be satisfied that restrictive agreements are in the public interest in terms of section 21 of the Restrictive Trade Practices Act, 1956. The fact that the court condemned the spinners' agreement despite its finding that the abandonment of the agreement was likely to have a "serious and persistent adverse effect" on unemployment in Lancashire lends particular force to this interpretation of the court's "temper."

The arguments advanced in support of the yarn spinners' price agreement, the Registrar's criticisms of these contentions, and the views and findings of the court are lucidly set out in some detail in the case report, and there would be little point in reviewing these at any length. The court, skilfully deploying data about the working of the agreement, established that, contrary to the claims made for it, the agreement was not a "stop-loss" agreement, *i.e.*, an agreement setting a low floor to price movements, designed to operate only in temporarily very depressed market situations. This finding weakened the case for the agreement.[2] Further, the court rejected a number of arguments in the context of the yarn spinning industry which are frequently and more generally brought up in justification of price agreements. Thus the court found that the agreement did not confer "specific and substantial benefits or advantages" on the "public as purchasers, consumers or users

[1] *Re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118.

[2] A stop-loss price agreement, found to be such by the court, was considered in the later case, *Re Blanket Manufacturers' Agreement* [1959] 1 W.L.R. 442. Unlike in the yarn spinners' case, where it was found that the agreement prices were frequently and for long periods the ruling prices (and hence that the agreement was not of the emergency stop-loss variety), it was found here that during the years 1955/58 sales at the agreement prices had been negligible and that practically all sales took place at higher prices. The court found, however, that the benefits flowing from the agreement could not be regarded as "specific and substantial" [as required in s. 21 (1) (*b*) of the Act]: one of the difficulties facing the trade association was that of establishing "any likelihood of a recession sufficiently severe to bring it [the price agreement] into really effective operation" (p. 452). It seems therefore that a stop-loss price agreement, to have a reasonable chance *qua* stop-loss agreement of a successful defence under the Act, should not have been in effective operation either too frequently or too infrequently. It is a case of "not too little, not too much, but just right."

of any goods" [s. 21 (1) (*b*)] by way of the following results claimed for the agreement[3]: price stability; maintenance of reserve capacity in the industry; maintenance of quality; modernisation of facilities and improvement of efficiency[4]; and prevention of monopoly or near-monopoly conditions. The court did find, however, "that the closing of mills consequent upon the abrogation of the scheme to be expected in the eleven areas [in which the industry is concentrated] . . . will have a serious adverse effect on the general level of unemployment in those areas. We find, though with even greater doubt and hesitation, that that effect will be persistent."[5] Thus the test laid down in section 21 (1) (*e*) was passed.[6] This particular conclusion was reached, inevitably, by a process of "speculation" and "guesswork"—thus providing an unspoken commentary on the court's apparent impatience with these forms of mental activity in *Re Chemists' Federation Agreement*.[7]

All this meant that the parties to the agreement had cleared the first of the two hurdles erected in section 21, and the court had to examine the detriments to the public resulting from the price agreement. The agreement came a cropper at this second hurdle. The court concluded that there were three heads of detriment. First, yarn and therefore cloth prices in the domestic market were higher than they would have been. Second, "quite a considerable export business has been lost" (mainly on cloth), and "we think that anything which appreciably hinders or diminishes the export trade must be regarded as a public detriment."[8] Third, the maintenance of excess production capacity and a swollen labour force was a "waste of national resources," and that, since "labour and capital should be employed as productively as possible," "excess capacity in the cotton industry is a public detriment."[9]

[3] It was claimed that certain benefits accrued from the agreement to trade purchasers of yarn (weavers); and the Weavers' Association supported this claim. It was argued that "although the sub-paragraph [21(1)(*b*)] refers to the public as a whole and makes no express provision for any sectional interest [weavers] being considered, it can be construed so that in a case such as this the advantage to only a small section of the public is sufficient to bring the case within the subparagraph." The court said: "We doubt whether this was the intent of the draftsman, but we recognise that the grammatical construction of the words may lead to this conclusion." But, in view of their final conclusion, the court did not find it necessary to decide the points of construction (p. 190). The benefits claimed were assumed to satisfy the test in s. 21 (1) (*b*); but in the final balancing of pros and cons they were given "little weight" (p. 196).

[4] The advantage to the public of the modernisation ascribable to the agreement was found to be "not a substantial one" and could not therefore be brought within the Act (p. 187).

[5] At p. 195.

[6] In most cases the abrogation of a minimum price agreement, by causing a reduction in ruling prices, may be expected to lead to some extension of demand, and hence would not affect employment adversely. In the present case the court did not refer to this extension of demand specifically in connection with its consideration of the employment position.

[7] See note on this case (1959) 22 M.L.R. 213.

[8] At pp. 195–196.

[9] At p. 196.

This last consideration weighed heavily with the court in its conclusion that the detriments outweighed the benefits. [It should be noted that the wording of section 21 refers to detriments to "the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by [parties to the agreement] . . ."; this wide scope allows the court to consider such matters as loss of exports or mis-allocation of resources which hardly affect the immediate consumers of the goods in question. On the detrimental side of restrictive agreements the court is enabled to take cognisance of any adverse economic effects.]

Most economists will probably agree with the court's conclusion that the spinners' agreement was against the public interest. Yet the economist will not be fully satisfied with one or two points in the court's analysis of the effects of the agreement. An example is already noted in footnote 6. Another calls for lengthier consideration. This concerns the size of the labour force in the industry.

Prima facie, even with the price agreement each spinning firm would not retain more labour (whether full or part-time) than it thought it could profitably employ at some time or other in the foreseeable future; and taking all firms in the aggregate, they would not be over-optimistic about future demand in view of the industry's long history of secular contraction. Now, if the abrogation of the agreement were to lead to a reduction in the total labour force and if it is very difficult to get back key labour once it has left the industry—as argued by the Association and apparently agreed by the court—then, *other things being equal*, it is highly likely that at some prospective periods of peak demand the industry's effective capacity (in spite of the heavy excess capacity in spinning machinery) would be less adequate than otherwise to meet the demand; and this would mean higher domestic prices and/or a smaller volume of exports at such times. Neither of these possible "adverse" repercussions of abrogation is mentioned in the judgment. It is possible, of course, that the court did not refer to such repercussions because it may have believed that other things would not be equal, and that, for example, price competition would stimulate a more efficient use of labour. Be this as it may, a necessary link in the chain of reasoning is not clearly specified.

It is true, however, that the view is stated, although almost *en passant*, that the abrogation of the agreement would itself reduce the amplitude of fluctuations in demand; from which it could be argued that some reduction in the labour force would be off-set. More generally, the court specifically stated that, without the price agreement, the industry would maintain "adequate reserve capacity." This, however, appears in the judgment as a bald assertion without any elucidation either of the mechanism by which the reserve will be maintained or of the meaning to be attached to the word "adequate." It may be that the court was so impressed

by the high degree of excess *machine* capacity in the spinning industry that it did not wish to deal at length with an important general issue. It may also account for the inadequate recognition in the judgment of the distinction between two different aspects of productive capacity, namely machine capacity and labour (particularly key labour) capacity. Whilst the court referred to data pointing strongly to the presence of redundant capacity in capital equipment, there is no real discussion of the presence of redundant capacity in the employed labour force; in particular, the fact of recent short-time working of personnel is not sufficient proof of longer-term redundancy, bearing in mind the difficulty of recruiting certain categories of labour and the possibility of variations in demand.

The matters raised in the hearings and dealt with in the judgment bear directly on the question whether or not the legislature has given the new court the task of making decisions on "justiciable" issues. It should now be quite clear that, in a case such as the present, the issues to be judged are not justiciable except in the trivial sense that they are in fact submitted for decision to a branch of the judiciary. It cannot be claimed seriously that the particular issue, the adjudication of which depended on the weighting of considerations such as the mis-allocation of productive resources, the volume of export earnings, local unemployment or the effects of price stabilisation, is justiciable in any more limited sense. Further, the student of monopoly problems in this country since 1948 will be aware that the judicial process and judicial reasoning have not—to judge by the present case—provided any specially efficacious or ingenious approaches to the difficult questions involved in the case-by-case method of dealing with business restrictionism: the methods of tackling the problems are to be found deployed in the reports of the Monopolies Commission. These are not criticisms of the legislation or of the court; but this early case should show most clearly that "in part, these decisions are decisions not only of fact and law but of economic and social judgment." [10]

A related question is whether, in the Act, Parliament has laid down the "principles" to be followed, leaving it to the court to interpret and apply them to particular cases. The present case points to a negative answer. There is not the slightest indication in the legislation—nor in the parliamentary debates—of how much or little emphasis the court was required to give, for example, to the question of regional unemployment, an important economic and social issue. The Act merely stipulates that the question of regional unemployment is a relevant consideration. The court decided that

[10] The President of the Board of Trade (P. Thorneycroft) on the second reading of the Restrictive Trade Practices Bill, *Hansard*, March 6, 1956, col. 1945.

the additional unemployment expected to be caused by the abrogation of the agreement was not sufficiently significant to outweigh the advantages to be gained from the termination of the detrimental effects of the agreement. But had the court decided differently, it could not have been criticised fairly on the ground that it had misinterpreted or misapplied the relevant section 21 of the Act.[11] Within fairly wide limits, in fact, the court is required to make policy in the area of economic policy covered by the legislation. Again, this is not necessarily a criticism either of the legislation or of the decison.

The judgment of the court touches upon one issue of considerable general importance, *i.e.*, the nature of the presumption, in section 21 of the Act, that restrictive agreements are against the public interest. Two interpretations of the section appear to be possible. The first is that the section places on the parties to the agreement the onus of establishing to the satisfaction of the court that the agreement should escape condemnation because it passes the tests laid down in that section. The second interpretation goes much further and claims that the presumption means that very few agreements should be able to pass the tests. The judgment includes one passage, which refers only to a limited issue, where the court appears to have favoured the second interpretation. In the course of its discussion of the claim that the price agreement was of benefit to the public in that it produced a measure of price stabilisation the court said[12]: "We cannot think that as a general rule it [price stabilisation] is a benefit; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest. There may be particular cases where price stabilisation confers a peculiar benefit sufficiently great to outweigh the loss of a free market, but this is not one of them."[13]

It would be both unseemly and foolhardy for one who is not a lawyer to say which of the two interpretations is applicable.

[11] There is a curious passage in the judgment (at pp. 196–197) in which the court seems to imply that its particular decision could not have been avoided. The court recognised that an increase in unemployment in Lancashire was unfortunate generally and particularly at a time when the general level of unemployment has been rising. "But we are clear that once we have reached a conclusion of fact, it is our duty to disregard the consequences of our verdict . . . The Act gives no power to modify the conseqences of our findings . . ." But since the consequence of increased unemployment *is* one which the court is specifically required to take into consideration when reaching its conclusion it is difficult to understand why it is its duty to "disregard" this consequence. The weight it gives to this particular consequence is certainly not defined by the Act.

[12] At p. 189.

[13] For the Registrar an apparently more extreme interpretation was urged in considering the scope of the phrase "specific and substantial benefit or advantage" in s. 21 (1) (*b*): ". . . A benefit cannot be 'specific' within the meaning of that paragraph unless it is something which does not normally flow from a minimum price scheme" (p. 157).

But in view of the importance of the matter, it is worth recalling that, when introducing the legislation, the Ministers responsible for it particularly stressed the placing of the onus of establishing a case on the parties to the agreement, and did not specifically make the point that the wording of section 21 was designed to allow only few restrictive agreements to meet the tests. Indeed, it was explained that the procedures embodied in the Act were preferred to that recommended by the Monopolies Commission in the (majority) report on *Collective Discrimination* in part at least because it was felt that the restrictive practices which were not in fact against the public interest would not be "very few." [14] This may not be relevant for the judicial interpretation of the words used in the statute; but it is of some interest in view of comments made, after the decision was given, that section 21 of the Act is too restrictive in placing the gateways through which practitioners of restrictionism have to attempt to navigate.

B. S. YAMEY.

THE BATTLE OF HABEAS CORPUS: THE LAST ENGAGEMENT?

IN *Re Hastings (No. 2)*[1] (noted at p. 184, *ante*) the Divisional Court of the Queen's Bench Division held that one whose application for a writ of habeas corpus had been dismissed by a Divisional Court could not make a renewed application, on the same grounds and the same evidence, to a differently constituted Divisional Court of the same Division; but it left open the possibility that he might be entitled to make a further application to a Divisional Court of another Division of the High Court. The applicant thereupon applied to a Divisional Court of the Chancery Division, convened at the request of the Lord Chancellor and consisting of Vaisey and Harman JJ.

On behalf of the respondent, the Solicitor-General took the preliminary point that a Divisional Court of the Chancery Division had no statutory jurisdiction in the matter, but suggested that if one member of the court were to withdraw, the remaining judge might exercise his power under section 46 of the Judicature Act,

[14] The majority of the Monopolies Commission recommended the prohibition by law of the range of restrictive practices known as "collective discrimination," with provision for the examination and possible exemption of exceptional cases. The Parliamentary Secretary to the Board of Trade (D. Walker-Smith) in winding up the second reading debate on the 1956 Bill, said: "The method of prohibition, subject to the examination of exceptional cases, has practical advantages over a case-by-case study governed by a presumption that these practices are against the public interest only if it can be shown that these exceptional cases are likely to be both very few and easily recognisable and dealt with. The whole of the history of this matter in many countries, the whole of the balance of probabilities and of the evidence of the Monopolies Commission in other cases which it has studied, show that that presumption would not be well-founded" (*Hansard*, March 6, 1956, col. 2054).

[1] Now reported [1959] 1 Q.B. 358.

1873, to reserve the case for the consideration of a Divisional Court. Harman J. accordingly withdrew; Vaisey J. decided to refer the matter to a Divisional Court; and Harman J. resumed his seat as a member of the court thus constituted. The court then dismissed the application (*Re Hastings (No. 3)* [2]) on the ground that the decision of the Divisional Court of the Queen's Bench Division had been equivalent to the decision of all the judges of the High Court. Since the Chancery Division was not a separate court from the Queen's Bench Division, the ancient right of an applicant for habeas corpus to go successively from court to court was of no assistance to an applicant at the present day.[3] It was unnecessary for the court to decide whether there was any right to apply successively from one *judge* of the High Court to another in term time, but Harman J. declared himself to be persuaded that no such right existed or ever had existed.

The present state of the law can now be summarised as follows:

(1) It is still possible to make successive applications to individual judges of the High Court in vacation.

(2) In term time, an application for habeas corpus may be made either to a Divisional Court of the Queen's Bench Division or to a single judge of any Division of the High Court. *Pace* Vaisey J.,[4] an applicant is not confined by the Rules of the Supreme Court to a Divisional Court of the Queen's Bench Division.

(3) If the application is made to a single judge in the first instance, the matter is likely to be referred by him to a Divisional Court. Once a Divisional Court has given its decision (either as the court to which the application was made in the first instance or as the court to which the application was referred) no further application based on the same grounds and the same evidence can be made. Appeal is the only remedy, and there is no appeal against refusal of an application in respect of a criminal cause or matter.[5] However, the Home Secretary recently announced [6] that legislation would later be introduced to provide for an appeal from the Divisional Court to the House of Lords in any criminal cause or matter, including an application for habeas corpus, where the point of law involved was one of general public importance which merited consideration by the highest tribunal.

[2] [1959] Ch. 368.
[3] No court other than the High Court has original jurisdiction to issue writs of habeas corpus.
[4] [1959] Ch. at 376–377.
[5] An appeal against the decision in the present case was dismissed by the Court of Appeal on the ground of lack of jurisdiction (*Times*, June 16, 1959).
[6] 610 H.C.Deb. 670 (July 30, 1959).

(4) If the application is made in term time to a single judge and is not referred by him to a Divisional Court, it would seem that there is no right to make a renewed application on the same grounds and the same facts to any other judge or judges of the High Court. *Eleko's* case,[7] where it was decided that such a right did exist, has not been formally disapproved, but in the light of the dicta in the second and third *Hastings* cases it is unlikely to be followed in any subsequent case.

S. A. de Smith.

Avoidance of Fraudulent Conveyance

The facts of *Re Eichholz*[1] were sufficiently remarkable to attract the attention of the popular press. In so far as they are material to Harman J.'s decision, they begin with the second marriage of a solicitor in January, 1955. After the marriage he opened two joint bank accounts; on one of these his wife occasionally drew cheques for household expenses, on the other she drew only one cheque for £200 for the purchase of some shares. In February 1955, unknown to the wife, the husband entered into a contract for the purchase of a house known as Peppermills for £15,500. The conveyance, to which the husband was not a party, was executed in the following month; it recited, inaccurately, that there had been an agreement with the wife for the purchase of the house and conveyed it to her in fee simple. In order to obtain the purchase-money, the husband had earlier written to his bank stating that he was purchasing the house under a contract of marriage with his wife and requesting a loan; in fact he did not complete the transaction in this way, but instead he sold certain bearer securities, which were later discovered to belong to clients, and credited the joint account with the proceeds. The husband furnished the house and, after they went into occupation, he paid all the household accounts including insurance premiums, although the insurance was in the wife's name, all bills were addressed to her, and she was the rated occupier.

The husband died in November 1957 and it was then discovered that he had for some considerable time been misappropriating his clients' money. The minimum of the claims against him at the time of the marriage was £171,000 and by the time of his death the total was about £500,000. His executors accordingly applied *ex parte* to have the estate administered in bankruptcy, and the trustee then laid claim, *inter alia*, to Peppermills and its contents. He contended that there had been no valid gifts by the husband and that the widow held both house and furniture

[7] [1928] A.C. 459.
[1] [1959] 2 W.L.R. 200; [1959] 1 All E.R. 166.

on a resulting trust; in the alternative he claimed to avoid the transaction under section 172 of the Law of Property Act, 1925, and under section 42 of the Bankruptcy Act, 1914. In view of the decision of the Court of Appeal in *Re Gould*,[2] which will be discussed shortly, the claim under section 42 was later abandoned.

Harman J. had little difficulty in deciding that there had been a gift of the house and its contents and that the wife did not hold them as trustee. Although the presumption of advancement that is raised when a husband buys property and has it conveyed into the name of his wife is not now so strong as it used to be,[3] there nevertheless is still such a presumption and there must be some evidence to rebut it. In this case all the evidence pointed the other way. The widow herself stated that she had known nothing of the purchase until it was a completed fact and that her husband had told her that it was a house for herself; in his letter to the bank the deceased had stated that he was providing his wife with a house; the purchase-money came out of a joint account in which the wife had prima facie a joint interest. The fact that the husband had paid all outgoings was not in itself inconsistent with a gift, and Harman J. expressly rejected any suggestion that the presumption cannot be drawn if it would, as here, necessarily involve a fraud upon the true owners of the bearer securities that had been sold to raise the purchase-money. This might well entitle them to follow the assets in the widow's hands, but this question did not arise in these proceedings; it is indeed difficult to see how the source of the purchase-money could conceivably affect the husband's intention with respect to the property in the house or goods.

In order to succeed under section 172 the trustee had to establish that there had been a conveyance, that it had been made with intent to defraud the deceased's creditors, and that it had not been made in good faith and for valuable or good consideration. The first of these points raised an interesting question of interpretation. There had been no instrument executed by the husband by which he had assigned any interest to the wife, and her counsel therefore contended that there was no conveyance within the meaning of this section. Harman J. was of the opinion that there could be a conveyance for this purpose even though there was no written document. In the first place, 13 Eliz. 1, c. 5, which the section replaced, referred to "every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels . . . by *writing or otherwise*," and the Act of 1925 being a consolidating statute, there is a presumption that the legislature intended no revolutionary change in the law. Furthermore, section 205 of the Law of

[2] (1887) 19 Q.B.D. 92.

[3] See *Silver* v. *Silver* [1958] 1 W.L.R. 259.

Property Act, 1925, enacts that for the purpose of the Act "conveyance" shall "*include* a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will," and although the word "include" may in certain circumstances mean that the list which follows it is intended to be exhaustive, such a list may do no more than enlarge the words used in a general sense in the body of the Act.[4] Indeed, the fact that section 205 also enacts that "property" shall include "anything in action, and any interest in real or personal property," serves to emphasise that a "conveyance" may be made otherwise than by writing, since it must cover dispositions of property passing by delivery.

Harman J. did not have to decide the point, however, since he held that the effect of the conveyance executed by the vendor with the husband's consent clearly conveyed to the wife the equitable interest in Peppermills vested in the husband by virtue of the contract entered into between himself and the vendor and that this transaction was clearly covered by section 172. The point may be important, however, in the case of a trustee in bankruptcy who is trying to set aside, say, an oral contract for the sale of goods. It would be on the face of it absurd to maintain that goods worth many thousands of pounds could not be recovered for the benefit of creditors in circumstances where the other requirements of the section are clearly satisfied.

The establishment of a sufficient fraudulent intent to satisfy the section presented no difficulty. It has been undoubted law since the decision of the Court of Appeal in Chancery in *Freeman* v. *Pope*[5] that an actual intent to defraud need not be proved if the necessary effect of the conveyance would be to defeat or delay creditors, and the existence of the enormous claims which the husband must have known could have been made against him at the time of the marriage precluded any possible argument to the contrary. Similarly, although the wife, who knew nothing of the husband's financial position, had acted throughout in good faith, her ignorance of the transaction until it had been virtually completed disposed of any question that the conveyance might have been one for valuable consideration.[6]

The final point taken by counsel for the wife was that the decision in *Re Gould*, which caused the trustee to abandon his claim under section 42 of the Bankruptcy Act, similarly precluded him from relying on section 172 of the Law of Property

[4] See *Dilworth* v. *Commissioner for Stamps* [1899] A.C. 99, 105.

[5] (1870) 5 Ch.App. 538.

[6] The reference in the husband's letter to the bank to a contract of marriage with his wife was too ambiguous to support a contract in consideration of marriage, for the agreement might have been either ante-nuptial or post-nuptial, and a contract to provide Peppermills specifically could not have been entered into until after the marriage.

Act. In the earlier case it had been held that a voluntary settlement executed by a person whose estate was being administered in bankruptcy but who had not been adjudicated bankrupt in his lifetime could not be set aside by the trustee under section 42. The *ratio decidendi* of that case, stated succinctly, is that section 130 of the Bankruptcy Act,[7] which applies Part II of the Act[8] to the administration of insolvent estates after an administration order has been made *so far as they are applicable*, is not intended to enlarge the assets to be administered but only to vary the rights of the persons entitled to them. A fuller examination of the statute shows that section 42 can come into play only when the settlor becomes bankrupt[9] and it is clear that in this case no one had been made bankrupt. These objections, however, cannot be raised in the case of proceedings brought under section 172, for which there is no need of a prior adjudication order and which may be brought by a creditor himself and without the intervention of the trustee in bankruptcy.[10] This section is designed to enable creditors to recover property from donees over whom they have priority; the decision in *Re Gould* is anomalous enough and, as Harman J. pointed out, it would indeed be absurd if the widow in this case could have defeated the creditors by applying *ex parte* to have the estate administered in bankruptcy. This being so, he held that the trustee must succeed and that the gift of the house and its contents could be set aside.[11]

P. M. Bromley.

Murder in the Course of Theft

The case of *R.* v. *Jones*[1] reveals in a most disturbing way the difficulties which the legislature has created for the courts to solve in the Homicide Act, 1957, by defining in the way it did in Part II of the Act various categories of capital murder. The particular category here involved is that contained in section 5 (1) (*a*), *viz.*, "any murder done in the course or furtherance of theft."

The facts in *Jones* were that the appellant broke into a co-operative society store at Huddersfield at 9 p.m. one evening and took some money from a safe on the first floor which he was

[7] This section substantially re-enacts s. 125 of the Bankruptcy Act, 1883, the effect of which was in question in *Re Gould*.

[8] *i.e.*, ss. 30 to 69. S. 42 substantially re-enacts s. 47 of the Act of 1883.

[9] See the judgment of Cave J. in *Re Gould*, at pp. 94–95.

[10] It was argued that the proceedings were misconceived because they should have been brought by the creditors and not by the trustee. Harman J. rejected this but also stated that, as the defect was purely formal, he would if necessary have permitted it to be cured by the addition of a representative creditor as a plaintiff.

[11] A further order with respect to various chattels and insurance policy premiums was made by Danckwerts J. (*The Times*, March 11, 1959). Appeals from the orders of both Harman J. and Danckwerts J. were dismissed by consent in the Court of Appeal (*The Times*, May 15, 1959).

[1] [1959] 2 W.L.R. 190; [1959] 1 All E.R. 411, C.C.A.

surprised to find open. Then, when he was about to go downstairs, the manager of the store returned, put the downstairs light on, and mounted the stairs. When he was near the top of the stairs, the appellant struck him a fatal blow. The appellant was convicted of capital murder under the Homicide Act, 1957. He appealed on the ground that his defence with regard to capital murder was not put to the jury, namely, that, as he had decided to leave the premises before he heard the manager coming, the theft was already complete when he struck the fatal blow, and it could not be regarded as murder in the course of theft.

It was held by the Court of Criminal Appeal (Lord Parker C.J., Donovan and Ashworth JJ.) that this defence had been adequately put to the jury, although it was true that it had not been put in very great detail. But the court went on to observe that they did not think it a sound argument to say "that if a man may be charged with thieving the offence is complete for all purposes, so that if thereafter in an attempt to avoid detection he strikes somebody and commits murder that it is not capital murder."

Two reasons are given for this conclusion: (1) The prisoner was caught red-handed at the scene of the theft, and in order to avoid detection he committed murder. The court thought it was difficult to see why that should not be within the words "in the course . . . of theft." (2) The court agreed with the view expressed by Lord Sorn in *H.M. Advocate* v. *Graham*[2] that if a man intends to commit theft and commits murder as a preliminary, that murder is nevertheless to be regarded as in the course of theft, even though, as in that case, there is only an attempt to break and enter with a view to committing larceny.

Three comments may be made on this decision. First, the facts in *H.M. Advocate* v. *Graham*, as described by Lord Sorn, were not the same as those before the court in *Jones*, and the remarks were mainly directed to the case of murder as a preliminary to stealing. In *Jones* the contention was that the theft was technically complete with the asportation from the safe of the money, whereas Lord Sorn went so far as to say that if, after an abortive attempt, a person gave himself up, and then, having submitted to arrest, killed his captor, "that put an end to the course of the theft and that a new chapter began as from that time." While one can appreciate the desirability of interpreting the capital murder sections of the Homicide Act, 1957, so as to avoid undue technicality, and while one may well take the view which the court here took, that merely because larceny is complete for the purpose of the law of theft, it does not follow that any subsequent killing must be regarded as no longer in the course of theft for the purposes of the law of capital murder, nevertheless it is respectfully submitted that in a matter where the liberty (indeed the very life)

[2] 1958 S.L.T. 167.

of the subject is in question, one would expect the law to be restrictively rather than liberally interpreted.[3]

Secondly, the mere fact that the prisoner was caught red-handed at the scene of the theft does not detract from the point that the theft was technically complete. The court thought it was difficult to see why the facts should not be regarded as coming within the words of section 5 (1) (*a*). But with respect there is equal difficulty in seeing why they should be so regarded. It is not part of the court's duty to make nonsense out of the words of the statute, and perhaps the members of the court must be admired for having struggled to reach such a sensible conclusion. But they have done so by reading into the statute something very similar to the express words of section 23 (1) (*b*) of the Larceny Act, 1916, which defines robbery with violence as being robbery where "at the time of or immediately before or immediately after such robbery" the accused uses any personal violence to any person. If similar words had been employed in section 5 (1) (*a*) of the Homicide Act, 1957, then the same decision could have been reached without doing violence to the language of the statute.

Thirdly, there is one aspect of the situation in *Jones* which has escaped notice, namely, that Jones had collected some cigarettes downstairs in the shop before he went up to the first floor, and had put them in a carton ready to take away from the premises. Admittedly, he was entitled to say he had changed his mind while upstairs and decided to leave immediately, but surely there was evidence on which, on a proper direction, the jury could reject his story and find that he was still "in the course of" stealing the cigarettes. In other words, that part of the total theft contemplated remained incomplete and in the event was uncompleted. On this view, there was no need for all the pother.

Finally, it should be carefully observed that the court did not feel it necessary to pass upon the other words of the section "or furtherance of theft," preferring to leave the consideration of the whole of those words together for another occasion. Students of Mr. Turner's writing on these phrases will look forward to the occasion with some degree of interest. It must be said, however, that it seems to this writer a tragedy that in English criminal law the question whether capital murder has been committed should rest upon the interpretation of such doubtful phrases.

J. E. Hall Williams.

Employers' Liability: A Phase of Contraction?

Since 1952, there have been substantial signs in the cases on industrial injuries that the courts are, where choice remains, inclined to

[3] On the duty of the courts in interpreting a penal statute, see the recent case of *R.* v. *Oakes* [1959] 2 W.L.R. 694, C.C.A.

reduce the area of employers' liability in respect of injuries sustained by workpeople in their employment, or by third parties as a result of workmen's torts. Broadly speaking, the revealed policy underlying these cases has been that the employer should not be liable for "negligence without fault"; but that the individual worker must take proper care of himself in his employment and must bear the full responsibility for his own carelessness, whether he injures himself or another—even if he has to insure himself against the latter liability.[1] *Qualcast (Wolverhampton), Ltd.* v. *Haynes*[2] and *Jenner* v. *Allen West & Co., Ltd.*[3] provide further indications of the trend away from the phase of expanding employers' liability that was initiated in *Smith* v. *Baker*.[4]

Qualcast v. *Haynes* involved one of those industrial risks that may be guarded against by providing the workman concerned with some special item of personal equipment, like a barrier cream against the risk of a serious skin disease like dermatitis, or goggles against the risk of eye injury, or masks against the risk of lung damage from silicon-laden dust. In *Qualcast* the risk was that run by metal moulders of being splashed on the legs and feet through a moment's mishandling of the ladles containing molten metal of temperatures around 1,300 degrees centigrade. Here, again, there is risk of serious damage, though Haynes himself was fortunate enough to escape with small and only temporary injury. The special items of equipment normally provided to counteract this danger are protective boots and spats.

Haynes' employers kept a stock of spats at the foundry which could be had for the asking, and, in addition, a stock of protective boots which they supplied to workmen at cost. Haynes, an experienced moulder, had been with Qualcast about three months when the accident occurred. He had never been advised or urged to use the protective equipment, nor, indeed, told it was available; he found this out from his fellow-moulders, some of whom used the spats. Nevertheless, he himself refrained from using the equipment and, indeed, continued to refrain on returning to work after his leg had healed.

On these facts, the House of Lords, reversing the Court of Appeal, held that the employers had not broken their duty to take reasonable care for Haynes' safety. Essentially,[5] the reason given

[1] The major pointers, in my opinion, are *Staveley Iron and Chemical Co.* v. *Jones* [1956] A.C. 627 (19 M.L.R. 309), *Bonnington Castings* v. *Wardlaw* [1956] A.C. 613 (19 M.L.R. 530), *Lister* v. *Romford Ice and Cold Storage Co.* [1957] A.C. 555 and *Davie* v. *New Merton Board Mills* [1958] 2 W.L.R. 21 (21 M.L.R. 309).

[2] [1958] 1 W.L.R. 225 (C.A.); [1959] 2 W.L.R. 510 (H.L.); also [1959] 1 All E.R. 38.

[3] [1959] 1 W.L.R. 554; also [1959] 1 All E.R. 115.

[4] [1891] A.C. 325.

[5] Other contributory reasons given were, (a) the omission from the Iron and Steel Foundries Regulations, 1953, of any mention of protective spats (H.L., at p. 513); (b) the amount of risk was not as great as in the case of pneumoconiosis, which was "in an entirely different plane" (at p. 515).

by the House of Lords was Haynes' experience: "An experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition."[6] In the case of an experienced man, the employers were under no duty "to bring pressure to bear on him to use [the spats], a pressure which, on the evidence, he would have ignored and might have resented."[7] The House of Lords emphasised that whether an employer has broken his duty of care is a question of fact, the answer to which depends entirely on the circumstances of each case, and that, therefore, what one court decides on the facts of one case cannot bind another court confronted with the facts of a later case.

This is technically impeccable. However, the possible combinations of factors in employment situations are not infinite. Situations keep recurring that are, for all practical purposes, similar in the risk involved, the experience of the workman, his appreciation of the risk, the amount of warning or advice received.

Take the earlier cases of *Clifford* v. *Challen & Son, Ltd.*,[8] *Woods* v. *Durable Suites, Ltd.*,[9] and *Crookall* v. *Vickers Armstrong, Ltd.*[10] In all three an experienced workman was involved; in all three a risk of serious damage was run (dermatitis and silicosis); in all three the workmen understood the risk they were running; in all three the use of the protective equipment was a nuisance to the workman. In *Clifford* v. *Challen* and *Crookall* v. *Vickers Armstrong*, the equipment was available and the workman knew it was, but he was not urged positively to use it: the employer was held liable. In *Woods* v. *Durable Suites*, the equipment was available and the workman knew it was, and he was constantly urged to use it: the employer was held not liable.

In *Qualcast* v. *Haynes* itself, the Court of Appeal considered there had been a breach of duty. Their attitude is summed up in the following passage from Parker L.J.: "It is quite clear that in an operation of this sort there is a risk, and a risk of serious injury—true, not injuries which are likely to be fatal or to affect the eyes, but clearly such as are likely to produce injury by burning; and it seems to me perfectly clear, in those circumstances, that there is a duty on employers not only to have protective clothing available but to inform anybody coming into their employment that they have got that equipment, and to take some steps to educate the man to wear the equipment for his own safety. . . . In some cases the hazard may be so great, and the injury, if it occurs, so serious, that it might be necessary to make the wearing of the protective

[6] At p. 513.
[7] At p. 517.
[8] [1951] 1 K.B. 495.
[9] [1953] 1 W.L.R. 857.
[10] [1955] 1 W.L.R. 659.

clothing a rule of the factory. Again, where the matter is not so serious, mere advice might be sufficient. But, at any rate, in this case some steps . . . had to be taken to educate men for their own protection to wear this clothing." [11]

Though the decision in the House of Lords was on technical grounds perfectly reconcilable with the previous decisions, it was clearly irreconcilable with their *trend* and has the effect of suggesting a lower standard of care owed to workmen once out of their period of trainee-ship. It emphasises that management must be equipment-minded rather than safety-minded in this class of case, and the experienced workman must look after himself or take all the consequences.

Lord Denning, it may finally be noted, though reluctant to allow that the employer need not urge or advise his skilled men to use protective equipment,[12] found fully in the employers' favour on the ground of causation: " Even if it had been the duty of the employers to urge this workman to wear spats, I do not think their omission should be taken to be one of the causes of the accident. It is often said that a person who omits to do his duty ' cannot be heard to say ' that it would have made no difference even if he had done it: see *Roberts* v. *Dorman Long & Co., Ltd.*[13] But this is an overstatement. The judge *may* infer the omission to be a cause, but he is not bound to do so. If, at the end of the day, he thinks that, whether the duty was omitted or fulfilled, the result would have been the same, he is at liberty to say so. So here, this workman, after he recovered from the injury, went back to work and did the same as before. He never wore spats. If the warning given by the accident made no difference, we may safely infer that no advice beforehand would have had any effect." [14] Whatever the justification for this finding of fact in the instant case, the dangers of defining the causal nexus in the realm of pure hypothesis and speculation need not be emphasised.[15]

In *Jenner* v. *West*, the cause of action was a breach of statutory duty. The statutory duty was the provision and use, under the Building (Safety, Health and Welfare) Regulations, 1948, of " crawling boards," where work is done on a roof covered with fragile materials through which a person is liable to fall more than ten feet. The job in question was the removal, repair and replacement of a roof gutter at the defendants' factory. To see to the gutter, the corrugated iron sheeting on the roof adjacent and sloping down to the gutter had to be removed and finally put back. Removal of the sheeting exposed and laid bare the beams,

[11] C.A., at p. 232.
[12] H.L., at p. 520.
[13] [1953] 1 W.L.R. 942, 946.
[14] H.L., at pp. 521–522. In the C.A. these considerations were related to the question of contributory negligence to find one-third in Haynes' favour.
[15] See the pertinent observations of Mr. J. C. Wood on *Nolan* v. *Dental Manufacturing Co.* [1958] 1 W.L.R. 936 in (1959) 22 M.L.R. 211–212.

purlins and wooden stretchers and the asbestos ceiling or inner skin of the building. The stretchers and asbestos were obviously fragile and unsafe to tread on.

The deceased workman was fifty-three years of age and had worked for the defendants for thirty-nine years. He was the leading plumber, but not the foreman, of the defendants' maintenance department and very experienced in making minor repairs on roofs and repairs to gutters: he was the man to whom the defendants turned when work had to be done on roofs. On the evidence, however, he had not done a task of these dimensions before. Normally, he used boards and ladders on the roof. This time, he became impatient before the arrival of ladders, crossed the roof by the beams, squatted on the edge of the corrugated iron portion of the roof that had not been removed, and in trying to draw the heavy sheeting back into position inadvertently put his foot through the asbestos ceiling and fell more than ten feet to his death.

The employers had scaffold boards (*i.e.*, broad, smooth boards) for work on the roofs, but not "crawling boards" (*i.e.*, broad boards with battens across for a better grip on a sloping roof). They were plainly, then, in breach of their statutory duty. But, what of the defences of delegation of statutory duty and contributory negligence?

Now, the employers could not delegate to the deceased man performance of their duty to provide crawling boards, but only to *use* them. Since no crawling boards were provided, no question of the delegation of their use could arise. However, the Court of Appeal did not quite take the point in this way. Pearce L.J. said: "It appears that he was given no instructions or help as to how this awkward task should be performed, although he apparently knew that, in general, boards should be used on roofs as a matter of practice. There was no evidence that he had been informed of the regulations by anybody. It appears that the foreman did not know them. . . . There is no evidence to suggest that the defendants ever made any efforts by instruction or otherwise to see that the regulations were communicated to the deceased."[16]

The learned Lord Justice then went on to indicate *obiter* the requirements of the defence of delegation of statutory duty: "In each case it is a question of fact whether or not a breach of the regulations by an employer through the fault of an employee gives rise to any claim by that employee. An employer can defeat such a claim if he can say: 'I am in breach of the regulations because of, and only because of, your default. I, myself, have not failed in any respect (apart from my vicarious default through your wrongful act) and my breach is co-terminous with yours.'"[17]

[16] At pp. 560–561.
[17] At p. 561.

Every solicitor and barrister whose practice includes industrial injury cases would be well advised to ponder this statement. If it indeed represents the view of the defence that the courts may now be expected to take, then I would suggest that the Court of Appeal's attempt in *Beal* v. *Gomme* [18] to neutralise the defence in favour of contributory negligence has been undone, and we are back to the position of *Smith* v. *Baveystock*.[19] That is to say, employers will have a complete defence to any action for breach of statutory duty wherever they are able to show that performance of the duty was explained and left to the workman plaintiff concerned, at least where he is a man of any skill or experience—possibly, even if he is not.

As to contributory negligence, the dead man was considered to be two-thirds to blame. The employers' responsibility was seemingly mitigated by the fact that they did at any rate provide scaffold boards, leaving their use to the experienced employee.[20]

The trend towards diminishing employers' liability and away from the idea of collective security in employment accident cases now appears sufficiently clear to stimulate an inquiry into the soundness of the direction of development. Since much more is involved than case law and philosophical arguments for or against fault liability, I believe that the time is ripe for a full and representative Committee or Commission to examine the whole question of the preventive and remedial aspects of employment accidents, including protective industrial legislation, the common law actions for damages and the common law defences, employers' liability insurance and the scheme of subsistence benefits under the National Insurance Acts.

C. GRUNFELD.

THE DOUBLE DEMISE OF HORTON'S CASE?

Smith v. *Austin Lifts* [1] is an interesting case but one of perhaps limited practical value in England, since it deals with the liability of an occupier of premises to an invitee prior to the operation of the Occupiers' Liability Act, 1957. The case merits attention, however, for several reasons: it is of importance to those common law jurisdictions where legislation has not affected the liability of occupiers at common law; it may still be relevant in England in those cases where an invitee was injured before January 1, 1958; it illustrates

[18] (1949) 65 T.L.R. 543.

[19] [1945] 1 All E.R. 531.

[20] The final point in *Jenner* v. *West* was about the voluntary payments made by the employers to the widow. These, it was held, following the rule in *Baker* v. *Dalgleish Steam Shipping Co.* [1922] 1 K.B. 361, resulted from the industrial death and were, therefore, to be brought into account in assessing the final amount of damages.

[1] [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81.

an interesting judicial technique whereby some Law Lords pay lip-service to a previous House of Lords decision but, in applying it, attempt to distinguish the previous case out of existence by implying that its *ratio decidendi* allows future judges a flexibility of decision which had not previously been understood; and it leads one to wonder how the court would tackle the facts of the case had the accident occurred after 1957.

It will be remembered that at common law the duty of an occupier of premises to an invitee is to "use reasonable care to prevent damage from unusual danger which he knows or ought to know,"[2] and that in *London Graving Dock* v. *Horton*[3] the House of Lords held that the invitor's duty is discharged if the invitee has full knowledge, even though the invitee does not agree to accept the risk of injury. In other words, a person will fail in his action if he incurred the risk *sciens* the unusual danger, and it is not necessary to prove that he incurred it *sciens et volens*. The decision was subjected to much criticism for it was thought that an occupier of premises could always evade any obligation to an invitee by merely warning the invitee of the danger and leaving him to fend for himself. It was pointed out that the language used in *Horton's* case indicated that knowledge must be sufficient to enable the invitee to appreciate the danger[4] fully but how significant this was to be was not realised.

The first inroad into *Horton's* case was made by Denning L.J. in *Greene* v. *Chelsea Borough Council*,[5] where he stated that *Horton's* case had been misunderstood, and continued: "knowledge or notice of the danger is only a defence when the plaintiff is free to act on that knowledge or notice so as to avoid the danger." Whether this is a logical inference from the majority judgments in *Horton's* case may be doubted, but, if accepted, it certainly modifies some of the harshness of the case.

The second inroad into *Horton's* case appears from *Smith* v. *Austin Lifts*. In this case the plaintiff, an employee of a company which maintained and repaired lifts, was sent to overhaul the lift at certain premises in which the machine house was on the roof and access to it was up a fixed ladder and through double doors, the base of which was some 11 feet above roof-level, those doors being secured by bolts. He had often been there in the course of his duty and knew that the left-hand door was defective because the lower hinge was broken. He had reported this to his employers who had informed the occupiers four times but the occupiers did not remedy it. The last time the plaintiff had been at the premises he could not

[2] Willes J. in *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 287.
[3] [1951] A.C. 737.
[4] *Per* Lord Porter at 748 and 749; Lord Normand at 755.
[5] [1954] 2 All E.R. 318, esp. 325. See a valuable discussion of this case in Street, *Law of Torts* (1955), pp. 201–202. See also *Slater* v. *Clay Cross* [1956] 2 All E.R. 625, 628, *per* Denning L.J.

bolt the defective door nor replace it in position, so he had tied the doors together with wire. On his subsequent visit he found the left-hand door jammed inside the machine house and the right-hand door open. At the top of the ladder he tested the left-hand door for handhold, grasping it low down. It seemed safe and he grasped it higher up to help himself in, but it gave way and he fell, sustaining injury. In an action against his employers and the occupiers the trial judge held them both liable in the proportions of 20 per cent. and 80 per cent. respectively. The Court of Appeal held they were not liable.

It was held by the House of Lords that the occupiers were liable to the plaintiff as invitee, although he knew that the doors were defective. Three judges [6] were prepared to accept an inference of fact that the change in the condition of the doors was by the occupiers or their servant, and thus the plaintiff did not fully appreciate the risk created by them by the changed condition. This is perfectly consistent with *Horton's* case. There was not sufficient knowledge to bar the plaintiff from recovering. Indeed, Viscount Simonds stated that had there been no change of circumstances *Horton's* case would have been fatal to the plaintiff's claim.[7] The judgments of Lord Reid (who was one of the dissenting judges in *Horton's* case) and Lord Denning are, however, more interesting. Both judges were unable to draw the inference that the occupiers or their servant changed the condition of the doors. Nevertheless, the occupiers were liable because, although the plaintiff knew that there was a danger, he did not fully appreciate the extent of it. Whether or not the plaintiff has a full appreciation of the nature and extent of the danger is not an objective test by reference to what a reasonable man would appreciate, but is completely subjective. If the plaintiff was in any way mistaken about the danger, so that the state of affairs was in fact more dangerous than he thought (although a reasonable man would have realised the full danger) the plaintiff may still recover.[8]

If this approach is accepted, does it not give a court power to pay lip-service to, but yet effectively ignore, the rule in *Horton's* case? Cannot a judge find as a fact that the plaintiff knew of the danger and appreciated it but, to use Lord Reid's words,[9] "his appreciation of the danger fell a good deal short of what is required"? [10] Once again judicial technique has produced a volte-face. Even though *Horton's* case decides that *sciens et volens* of the danger is no longer required to defeat a plaintiff's claim, *sciens* of itself is not sufficient unless it amounts to something approaching

[6] Viscount Simonds, Lord Morton and Lord Somervell.
[7] [1959] 1 W.L.R. 100 at 104.
[8] *Per* Lord Reid at p. 113, Lord Denning at p. 116; *cf.* Lord Somervell at p. 113 who appears to believe that the test is objective.
[9] p. 113.
[10] See *Mace* v. *Green and Silley Weir, Ltd.* [1959] 2 W.L.R. 504 at 510.

sciens et volens. Where the distinction lies is difficult to see,[11] and thus the judge is given almost a free hand.

Now that the Occupiers' Liability Act, 1957, is in force, how is *Horton's* case affected by it? It is widely canvassed that *Horton's* case is no longer law.[12] The Act provides that the occupier of premises owes to his visitors the " common duty of care," and that " where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.[13] The Act does not refer specifically to a case where the visitor is not warned by the occupier but knows of the danger, as in *Horton's* case itself. It may well be that the interpretation placed upon *Horton's* case by Lords Denning and Reid in *Smith* v. *Austin Lifts* equates the old common law position with the present law after the Act. The old common law duty owed by an occupier of premises to his invitee is similar to his present common duty of care to his visitors. However distasteful it may be, it is possible for a court to apply the reasoning of *Horton's* case to determine that a plaintiff will fail when although *sciens* of the danger he is not *volens* (except in the case where the *sciens* arose from a warning by the occupier).[14] If that is so, then the attitude of Lords Reid and Denning in *Smith* v. *Austin Lifts* may be relevant in future actions.

Although the Occupiers' Liability Act is stated to be progressive in stressing, for example, that a warning is not to be treated without more as absolving the occupier from liability, one may well wonder what effect this progressive trend has when in the same section of the Act[15] the decision in *Ashdown* v. *Williams*[16] is apparently perpetuated. In *Smith* v. *Austin Lifts* if there had been a notice near the machine house clearly warning persons of all dangers, that notice would not necessarily have been sufficient to allow an occupier to evade his duty, but if, in the same notice, the occupier had also clearly excluded all liability for negligence, that would have been an end of the matter, whether the accident occurred before or after the Act.

The other aspect of *Smith* v. *Austin Lifts* is also interesting but must be treated more briefly. The House of Lords (Lord Reid dissenting) held that the plaintiff's employers were also liable since they failed in their duty to ensure that the third party's premises were

[11] The examples given in the Occupiers' Liability Report, Cmd. 9305, at p. 13, and by Lord Denning in the present case at p. 116, do not assist in understanding the distinction.

[12] *e.g.*, Payne (1958) 21 M.L.R. 359, 362.

[13] s. 2 (4) (*a*).

[14] *Cf.* the development of the liability of a negligent manufacturer of defective goods to the ultimate consumer since *Donoghue* v. *Stevenson* [1932] A.C. 562.

[15] s. 2 (1) by the use of the words " or otherwise."

[16] [1957] 1 Q.B. 409, C.A.

reasonably safe for the plaintiff.[17] Their Lordships expressed difficulty in deciding this point, but the majority were not prepared to disagree with the trial judge's finding that the employers should, in the circumstances, have exercised greater supervision.[18] Although agreeing with the majority Viscount Simonds stated: "I deprecate any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and imbecile child." No doubt this utterance will be repeated in the courts for many years to come.

GERALD DWORKIN.

ESTATE AGENTS' AUTHORITY

AN important issue as to the extent of an estate agent's authority came before the Court of Appeal in *Ryan* v. *Pilkington*.[1] The owner of leasehold property instructed the first defendant, an estate agent, to find a purchaser. The plaintiff made an offer which was accepted "subject to contract," so that at that stage neither party was bound,[2] and paid the agent £200 by way of deposit. The vendor then decided not to sell and broke off negotiations; the plaintiff was therefore entitled to the return of his deposit.[3]

The estate agent failed to return the deposit to the plaintiff, who eventually sued the agent for the money, said to have been deposited with him as a stakeholder. The agent pleaded that he had received the money as agent for the vendor and was not personally liable, and the plaintiff accordingly joined the vendor as second defendant. The county court judge accepted the estate agent's argument and dismissed the claim against him, but gave judgment for the plaintiff against the vendor. The vendor appealed.

There was no merit in the estate agent's position, for it was never suggested that he had accounted for the money to the vendor, and at the date of the trial he was serving a three-year sentence for fraudulently converting deposits in circumstances similar to those in issue.[4] But he was also bankrupt, and the real issue was: who had been defrauded by the agent, the vendor or the purchaser? The Court of Appeal held that the loss must fall on the vendor, and dismissed his appeal.

[17] Lord Denning, on this point, again referring to *Horton's* case, repeated his view that had Horton sued his employers he would almost certainly have succeeded.

[18] *Cf. Mace* v. *Green and Silley Weir, Ltd., supra.*

[1] [1959] 1 W.L.R. 403; [1959] 1 All E.R. 689, C.A. (Hodson, Morris and Willmer L.JJ.).

[2] *Winn* v. *Bull* (1877) 7 Ch.D. 29, Ch.D.; *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, Ch.D.; *Rossdale* v. *Denny* [1921] 1 Ch. 57, C.A.; *Coope* v. *Ridout* [1921] 1 Ch. 291, C.A.

[3] *Chillingworth* v. *Esche* [1924] 1 Ch. 97, C.A.

[4] See *R.* v. *Pilkington* (1958) 42 Cr.App.R. 233, C.C.A.

The sole question for determination was whether the estate agent received the deposit as agent for the vendor. He had certainly signed the receipt for the deposit "as agent for [the vendor]," but the vendor denied that the estate agent had authority to receive any deposit otherwise than as stakeholder. He had, he claimed, merely instructed the agent to find a purchaser, and that did not give the agent any authority to receive a deposit as his agent.

There appear to have been only two other reported cases concerning the position of a deposit paid to an estate agent before any contract is entered into: both dealt with the agent's liability, and both involved the same estate agent as the instant case.

In *Brodard* v. *Pilkington*[5] the agent gave a receipt for the deposit which did not describe the capacity in which he received it. When the vendor broke off negotiations, the purchaser asked for the return of the money and the agent wrote a letter promising to repay it. The purchaser obtained summary judgment against the agent under R.S.C., Ord. 14, and the agent appealed to the Court of Appeal for leave to defend the action on the ground that he had received the money as agent for the vendor. The appeal was dismissed, as the agent's letter promising repayment was treated as an admission that he had received the deposit as stakeholder and was personally liable, but Denning L.J. added that "in the ordinary way an estate agent receiving a deposit does receive it as stakeholder unless the contrary is said." This interlocutory appeal is, however, only shortly reported, and it is not clear how much argument was devoted to the usual practice of estate agents. Hodson L.J., who sat with Denning L.J. in *Brodard* v. *Pilkington*, presided at the hearing of *Ryan* v. *Pilkington* and explained that the earlier case turned on the agent's letter. As to the remark quoted, he commented: "I do not think it was in any way necessary for the decision of the case."

R. v. *Pilkington*[6] was not referred to in the instant case. The estate agent was convicted on charges that he had fraudulently converted deposits paid to him by would-be purchasers, and appealed on the technical point that he had in fact defrauded the vendors, not the purchasers. "It is not pretended," said Lord Goddard C.J.,[7] "that the appellant was not carrying on one of those fraudulent businesses of taking deposits from people who want to buy or obtain houses and putting the money into his own pocket, so that when the depositors asked for the money back it was not forthcoming. . . . The only point that was made in the court below and in this court was that the wrong person has been named in the indictment as the person defrauded." The question of the capacity in which the agent received the money was treated

[5] (1953) 161 E.G. 436, C.A. Also reported [1953] C.P.L. 275.
[6] (1958) 42 Cr.App.R. 233, C.C.A. (Lord Goddard C.J., Slade and Devlin JJ.).
[7] 42 Cr.App.R. at p. 234.

as a question of fact, but the views of the Court of Criminal Appeal were made plain by Lord Goddard when he said: "The learned Recorder directed the jury that it was for them to decide what was the true nature of the transaction. He did not go on, as he might have done, to say that the inference was irresistible that the appellant was receiving the money as stakeholder. . . . When [the persons named in the indictment] paid their money to the appellant and said: 'We are willing to negotiate and we give you some money as proof of our willingness to negotiate,' they meant that, if no contract was concluded, they were to have their money back. Who else was to have it? The vendor would have no right to the money. The offer had been made to the vendor that, subject to a formal contract being signed, the house would be bought. There was no engagement on either side and the money had to be refunded. Instead of that the appellant kept the money, and, when the depositors asked for their money back, they did not get it." [8]

An important difference between *Ryan* v. *Pilkington* and the two earlier cases lay in the terms of the receipt given by the agent, which in the latest case clearly stated that he had received the money as agent for the vendor. As Willmer L.J. pointed out, this made it impossible for the vendor to allege that the estate agent had received the money as stakeholder, for "that would involve a finding that he was acting as agent for both parties, *i.e.*, that both the vendor and the prospective purchaser had authorised him to receive this sum of money. But any suggestion that authority was given by the prospective purchaser to the estate agent to hold money on his behalf seems to me to break down on the terms of the receipt which he accepted from the estate agent." [9]

Although that disposes of the "stakeholder" possibility, it does not dispose of the question whether the vendor is bound by the terms of the receipt given by the estate agent without express authority. The three judgments in the Court of Appeal use the words "implied authority," "apparent authority" and "ostensible authority" indiscriminately, but it seems clear that, despite the absence of evidence concerning the practice of estate agents,[10] the basis of the decision is that the receipt of a deposit is reasonably incidental to the introduction of a prospective purchaser. In the absence of evidence concerning the usual practice, however, it is difficult to see the justification for the observation of Willmer L.J. that "the question . . . is, what would a reasonable man in the prospective purchaser's position think when the estate agent

[8] *Ibid.*, p. 235.

[9] The vendor's argument itself back-fired: ". . . if it can be inferred that it would be within the scope of the authority of the estate agent to accept money as stakeholder, *i.e.*, that he is in a position to take money as agent for both, I cannot see why in principle it should be outside the scope of that same authority to take money as agent for his vendor alone . . ."—*per* Hodson L.J.

[10] See *per* Hodson L.J. [1959] 1 All E.R. at p. 692. Perhaps this is why the term "usual authority" was not used.

appointed by the vendor asks him in the course of the negotiations for a deposit? Surely any reasonable man in such a position would assume it was within the scope of the agent's authority to receive it on behalf of the principal, all the more so when the agent furnishes him with a receipt signed by himself as agent for the named principal." No reasonable man would be justified in such an assumption if estate agents never in fact demanded deposits from would-be purchasers, so that the basis for this line of thought is no doubt to be found in the taking of judicial notice by the court of the undoubted practice of estate agents.

The facility with which the Court of Appeal has found that it is within the usual authority of an estate agent to receive a deposit before a binding contract is entered into may be compared with the courts' searching examination of the authority of a solicitor to receive the purchase money on the sale of property; there it was held that, despite the prevalence of such a practice, an express authority must be shown.[11]

The result of *Ryan* v. *Pilkington* may be a change in the practice of the black sheep in the estate agents' profession. If he takes a deposit as stakeholder, subject to contract, then he acts as agent for both parties, and if he fails to return the money to the purchaser on demand he may be sued by the purchaser. If he fails to describe the capacity in which he takes the deposit, he may perhaps be held to be a stakeholder,[12] though the position is far from clear. But if he takes it as agent for the vendor, he cannot be sued by the purchaser,[13] and he may therefore gain more time if he permits the purchaser to sue the vendor and waits for the vendor to bring him in on a third-party notice.[14]

The case draws attention once again to the risks arising out of the absence of compulsory regulation of estate agents. In the present state of the law, anyone can open shop as an estate agent and, with luck, lay his hands on sizable sums of money paid to him as deposits. He can pay the money into his own bank account and draw on it for his own purposes, relying on future deposits in order to pay the money over to the vendor on completion of the sale weeks later.[15] There is, indeed, nothing to stop Mr. Pilkington himself, after completing his two years in prison, from opening his

[11] *Viney* v. *Chaplin* (1858) 2 De G. & J. 468, C.A. in Ch., followed in *Ex p. Swinbanks, re Shanks* (1879) 11 Ch.D. 525, C.A., resulting in a change in the law in the Conveyancing Act, 1881, s. 56; see now Law of Property Act, 1925, s. 69.

[12] As shown above, this is the assumption underlying *Brodard* v. *Pilkington* and *R.* v. *Pilkington*.

[13] *Ryan* v. *Pilkington*, in the county court; the claim against the bankrupt agent was not pursued in the Court of Appeal: *per* Hodson L.J.

[14] The risk of loss of the deposit both before and after exchange of contracts is dealt with by D. Macintyre, "Loss of the Deposit" (1958) 22 Conv. 258.

[15] Compare the Solicitors' Accounts Rules, 1945, requiring a solicitor to pay all clients' money into a separate client account, a practice voluntarily adopted by the more reputable estate agent.

business once again.[16] Statutory control of the profession is long overdue, but until that comes the prudent purchaser will refuse to pay any deposit to an agent, offering instead to pay the money to the vendor's solicitor as stakeholder as a token that he means business.

Aubrey L. Diamond.

[16] If it can be proved that the agent has made use of the money, he is liable to pay interest on it: *Rogers* v. *Boehm* (1798) 2 Esp. 702; *Harrington* v. *Hoggart* (1830) 1 B. & Ad. 577, *per* Lord Tenterden C.J., at p. 586.

REVIEWS

ADMINISTRATION OF JUSTICE IN NORWAY. A Brief Summary. Edited by the Royal Norwegian Ministry of Justice. [Oslo. 1957. 145 pp. To be obtained from the Royal Norwegian Embassy, London. 5s.]

DAS ZIVILPROZESSRECHT FINNLANDS. By Tauno Tirkkonen. Publikationen des Finnischen Juristenvereins. Serie D No. 3. [Helsinki. 1958. (Obtainable from the Akateeminen Kirjakauppa. Helsinki.) xiv and 103 pp. 1,200 Finn.Mks.]

CIVIL LITIGATION IN TURKEY. By DELMAR KARLEN, Professor of Law, New York University and ILHAN ARSEL, Lecturer, Faculty of Law, Ankara University. Joint Publication Series No. 7 of the Legal Research Institute, Faculty of Law, University of Ankara and the New York University Graduate School of Public Administration and Social Services. [Ankara: Ajans-Türk Press 1957. xii and 279 pp. 20 T.L.]

THESE three works, all devoted to the law of procedure, published at about the same time in countries as diverse as Norway, Finland and Turkey are all primarily intended to serve the purpose of introducing foreign lawyers to the procedural law and the constitution of the courts of the country with which they deal. They show that legal writers are now gradually becoming aware of the pressing need within the Western world for a better mutual understanding in the field of procedure. Only those totally unacquainted with recent developments affecting the practice of private international law can still hold the view that comparative jurisprudence in the field of procedure is a matter for a few academic lawyers. It is, in fact, probably of greater practical importance than the manifold endeavours in comparative substantive law, to which so much energy is now being devoted. After all, the first question which any practitioner confronted with an international difficulty experienced by a client will ask himself must necessarily be procedural: which court has jurisdiction? Once it has been ascertained that jurisdiction is vested in a foreign court, he will be compelled to investigate how the foreign courts work, on what conditions non-residents or foreigners can sue there, what rules of evidence are applied, etc. It is an undoubted rule of substantive law everywhere, that he who purchases goods in a shop must pay the price agreed with the shopkeeper. But procedural differences may result in a lawsuit based on these same facts being won in one country and lost in another. Professor Karlen and Dr. Arsel deal with a hypothetical case of jewellery sold on credit in a shop. They come to the conclusion that on the same facts and on practically the same substantive law the shopkeeper in Turkey might go to jail, while in the U.S.A. he would recover his debt plus the costs of the action.

The three works,—all of which are of a high standard,—are illustrative of different approaches to the problem of acquainting lawyers from one country with the procedure of another. The Norwegian work was originally written in the Norwegian language in response to inquiries from foreign lawyers visiting Norway and wishing to know how justice is administered there. It was therefore mainly aimed at lawyers from other Scandinavian countries, possessing the inquisitive minds of intelligent travellers. The Ministry felt

the need for publishing an English version of this work and the present brochure, prepared by Judge Rynning of the Court of Appeals of Oslo, is the result. It is a most interesting work, which has fortunately retained enough of the character of a lawyer-traveller's guide book to constitute in part very fascinating reading. Norwegian procedure is in many ways nearer to English procedure than that of any other European country. The rule of oral hearing has retained a great deal of its force. Witnesses are examined and cross-examined by attorneys and not—as everywhere else—by the judge. It is noted, however, that " the examination will be conducted along less aggressive lines than in the Criminal Courts of some foreign countries," the presiding judge being entrusted with ensuring that the witness will " throughout the examination enjoy a rather potent protection by the court " (p. 145). A particularly valuable feature of the work—alas, all too rare in books on the constitution and procedure of the courts—is the reproduction of a number of most interesting photographs, showing court buildings and courts at work. Any county court judge perusing the work will feel envious of the stately mansions which his Norwegian colleagues enjoy at a cheap rent payable to the Norwegian Treasury. These buildings in a separate wing provide rooms for the court and its offices (see at p. 114). On comparing his own salary to that of his Norwegian brother (see p. 113) he might, however, feel a little more reconciled to the duties of his circuit, though perhaps our income tax system might deprive him of a great deal of the advantage that he would seem to enjoy in this respect. The book includes a brief summary of the basic principles of Norwegian criminal law. It is probably impossible for any lawyer with any interest in his craft to invest 5s. better than by acquiring this interesting booklet.

Professor Tirkkonen's work being addressed to lawyers from the German-speaking countries is necessarily of an entirely different type. It is in contents and form a small-size, scholarly and lucid treatise on civil procedure, following the arrangement, the conceptions and the terminology to which German lawyers in particular have become used. It is a great merit of the German and Italian schools of civil procedure to have elaborated a most convenient system describing and analysing the procedure of the courts. This system—like the principles of grammar—is readily applicable to any law of procedure and can thus serve as a most efficient means of mutual understanding between lawyers from different countries. Anybody doubting the practical usefulness of the academic theory of which this system is the result, should look at the mass of information which Professor Tirkkonen by applying this method could compress into his small book without in any way rendering it either difficult or unattractive reading. That Finnish law has been strongly influenced by the German theory and practice of procedure is obvious from this work. One of the resulting drawbacks is that proceedings have become largely written. Finnish courts refuse on principle to enforce foreign judgments, though foreign judgments in status matters are in certain cases recognised (p. 54). This work—unlike the Norwegian book—is not an official publication. A beneficial consequence of this is that Professor Tirkkonen was able to criticise freely a number of aspects of his legal system, though his criticism remains well within the confines of the German-Italian school of procedure. The learned author expresses no doubt on the justice and efficiency of a system of procedure which has entrusted a dominating, and in fact a domineering, position to the court without at the same time ensuring the highest possible quality of the bench.

Any Continental system of procedure can easily be described in the terms and conceptions of every other Continental system. No convincing attempt has as yet been made to describe English or American procedure in the terms and conceptions of Continental law. But there cannot now any longer be any doubt that it is possible to state a Continental system in the manner in which it is (or should be) usual to state the law of procedure in an English or American court. This has been fully demonstrated by Professor Karlen and

Dr. Arsel's work which—though printed in a very modest manner and presented with an equally modest preface—constitutes in fact one of the most important recent contributions to the theory and practice of procedure—both internal and comparative. Following the Anglo-American approach the learned authors' method is dynamic rather than static: they do not, as do their Continental colleagues, aspire in the first instance to describe the courts and their work and only incidentally how the parties must act before them. They explain how one commences an action, how one states one's claim or defends oneself against the claim of the plaintiff, how one prepares for, and conducts, the trial and only finally how the court renders its judgment. All this explanation is given in a twofold manner: we hear how it is done in Turkey as well as in the U.S.A. That the information supplied by the authors on the law of the U.S.A. could not be equally elaborate as that on Turkish procedure is obvious to anybody who reflects on the fact that there are now 49 different laws of civil procedure in force in the U.S.A. The comparison offered by the authors is never a mere mechanical juxtaposition of bare legal rules. We are told how the statutory or judge-made rules work in practice, to which extent they are honoured in the breach more than by obedience and where differences on details between them have their bases in fundamental ideological or cultural divergencies or in mere technical grounds. Last but not least the learned authors have systematically considered chapter for chapter what each country could learn from the other and submitted detailed recommendations.

It is impossible to read through this most instructive work, written with great practical understanding and unfailing clarity, without being kept spellbound by the mass of new insights which the authors have arrived at and by the way in which they have stated them. Thus, to give a few examples only, the difference between the American and the Turkish idea of the trial and the manner in which each of the different conceptions necessitates delay at different stages of the proceedings which should and could to some extent be avoided (see pp. 59 *et seq.*) is explained in detail. The myth that there was no Continental law of evidence is exposed (pp. 83 *et seq.*) and replaced by a careful comparison of the entirely different purposes which the Continental and the American rules of evidence are trying to serve. The Turkish career judiciary is compared to the American judicial set-up (pp. 73 *et seq.*). Two hypothetical cases are followed up in both systems of procedure (pp. 107 *et seq.* and 142 *et seq.*). They provide a colourful illustration of the authors' explanations.

Well over one-third of the book is filled by a translation of the Turkish Code of Civil Procedure and of the famous Turkish *Law on Judges* of 1934. Some parts of this law make very strange reading for non-Turkish lawyers. Judges are divided into no less than ten degrees and three grades, only those of the seventh degree of the third grade and upwards enjoying some modicum of independence. The Court of Cassation when reviewing judgments of inferior courts rates each decision according to the judicial ability shown in it. Article 35 of the statute provides i.a.

> "The ratings shall be 'very good,' 'average' or 'poor.' The following matters shall be taken into consideration: the reasoning expressed in the judgment, analysis of facts, delay, compliance with orderly procedure and comprehension of issues. Affirmation or reversal of the judgment shall not necessarily affect the rating . . . . Every six months such ratings shall be compiled by the Ministry of Justice and placed in the personal files of the individuals concerned."

As the Court of Cassation deals with no less than some 150,000 cases per year, supervision of the inferior courts in this manner can probably be pretty effective. One cannot, however, be too much surprised that in the circumstances it is not easy to find aspirants for the judicial career in Turkey. Obviously the task of sitting on the inferior courts is no easy one: these courts possess no libraries, no reports of the decisions of the Court of Cassation are

published and—according to our learned authors—the attorneys leave the bulk of the work to the judiciary. The Court of Cassation on the other hand will, no doubt, find its own position of critic of the rest of the judiciary strengthened by the fact that in general it will not state the reasons which have induced it to either affirm or reverse a verdict of a lower court.

This work is part of a series of Turkish-American studies in law. Its practical and theoretical value is such that one must hope that means and ways will be found to extend the application of the method applied here to other countries. If a Maecenas could be found to support a series of similar studies, comparing English law in a practical and critical manner point for point to that of one or several Continental countries, a service could be rendered to the cause of both legal practice and legal science the importance of which could hardly be overstressed.

E. J. Cohn.

John Philpot Curran: His Life and Times. By Leslie Hale. [London: Jonathan Cape. 1958. 287 pp. (with Index). 25s. net.]

This is a very readable book, the main interest of which lies in the political rather than the legal field and in the personalities who dominated the Irish scene in the critical period between 1750, the date of Curran's birth, and 1800 when he was at the height of his powers. Mr. Hale who has a lively, if rather journalistic, style is obviously more concerned with the struggle for Irish freedom than with his hero's legal career. Yet there is a great deal in the book of surpassing interest to lawyers, and the character of Curran as a man and a lawyer while drawn sympathetically enough is certainly not painted in the high colours of flattery. And the fight in which Curran engaged was in fact conducted largely in the courts of law where of course the great advocate was a dominating figure. The political history of this period in Ireland is therefore deeply tinged with a legal colouring so that Curran is much more in the picture than he would have been had the contest been purely Parliamentary, for he shone less brilliantly at College Green than in the Four Courts.

John Philpot Curran was the son of the steward of an Irish landowner. He was content to describe himself as of peasant origin and his career bears witness to the fact that the practice of the law was in Ireland very much a career open to the talented, as indeed in other parts of the United Kingdom, during the eighteenth century. He is, I suppose, principally remembered by modern lawyers because of his numerous witty exchanges with the judges and for his reputation as an advocate of the highest ability, rivalled only in his own time by Erskine.

Yet although he devoted his life to the practice of the law Curran seems to have been more passionately concerned with the freedom of his native country than with legal advancement. He came into public life at the time when the star of Henry Flood was beginning to pale before that of Grattan, with whom he was closely identified during the whole of his political career. These statesmen, who belonged to the Protestant ascendancy, were mostly of English stock, were loyal to the British connection and would have been content with quite moderate measures of reform. Curran never abandoned this position and his loyalty was accepted at the Castle even when he was in the worst odour there. Yet his greatest work as an advocate was accomplished in the defence—generally unsuccessful—of the extremists whose impatience led them into treasonable correspondence with the French Government. Many of these were his personal friends, and in one case, that of Robert Emmet, the suitor of his daughter and the intimate friend of his son. Many of his greatest forensic efforts were generated therefore by emotions which far transcended an advocate's normal enthusiasm for his work.

From 1794 when that extraordinary figure Parson Jackson arrived in Dublin as the emissary of the French revolutionaries until 1803 when Robert Emmet was executed Curran lived through a period of extreme emotional tension. The mass of the Protestant population began to feel themselves a beleaguered garrison and their representatives in Dublin Castle struck out blindly in all directions. Civil liberties ceased to exist, evidence was fabricated, juries were packed, and many who it should have been obvious were perfectly innocent were brought to the gallows. Indeed this is one of the most discreditable episodes in English history, for although this régime of judicial lawlessness was carried through for the most part by Irishmen, many of them of English origin no doubt, the government in London was perfectly well aware of what was going on and must accept a major share of the responsibility.

Here and there the gloom of this terrible period is relieved by the careers of men like Arthur Wolfe, the law officer, who kept their heads clear and their hearts warm, and who tried to administer the law fairly in times of panic, tempering justice with mercy as far as was humanly possible. Wolfe was one of Curran's greatest friends and his murder during the senseless Emmet rising shortly after his elevation to the bench as Lord Kilwarden is one of the many tragic episodes of this period. It has so often happened in Irish history that the most upright and best affected were killed or forced into exile by the "patriots."

But the Emmet rising had an even more terrible sequence for poor Curran. His daughter and possibly his son were sufficiently implicated for the Castle to be able to give him the option between returning his briefs for the defence of several of those who were put on trial, and seeing his dear ones in the dock. He not unnaturally chose the former, and who should blame him, though some of the seagreen "patriots" have in fact done so. There is subject-matter for a fine tragic play here, as indeed there is in many an episode in Irish history were the dramatist forthcoming.

One of the strangest actors in these events is Leanord MacNally, whose career bears witness to the difficulties which beset the average decent man who tries to play his part on the side of freedom in a revolutionary period but has not the character and will-power to make the sacrifice of his life in the cause. MacNally, a barrister like so many of these Irish rebels, got himself sufficiently mixed up with Parson Jackson to give the Castle material on which they could offer him the alternative of the dock or acting as a spy on his comrades. His courage failed and as Mr. Hale says "he lived on, a patriot by day, an informer by night." As an advocate he assisted Curran with the defence in many of these cases, for others he acted alone. He appears to have defended his clients honestly and with ability while reporting to the Castle all that he learned from them. One of these, Connor, a schoolmaster, who like so many of the others was condemned to death, was offered a respite if he would betray his friends, but courageously refused to do so. When reminded of his children he sturdily replied, "He who feeds the ravens will care for them." The irony of the situation in which MacNally found himself when reporting this conversation does not need to be underlined.

It is pleasant to think that having spent his best years in the hot and thundery weather of the revolutionary period Curran emerged unembittered to enjoy something of an Indian summer. In 1806 his political friends came into power in England. They did not behave generously to the Irish Whigs and for some time Curran received no preferment. The climate was milder however and shortly afterwards he became Master of the Rolls in Ireland.

This was not regarded as much of a plum at the time and Curran would probably have refused it had his health been sufficiently robust for him to keep up his practice at the Bar. He seems to have been a just if not a very learned judge, but his tenure of the position hardly added to his fame and in 1813 saddened by the death of his son and himself debilitated by the exertions of his earlier career he went into retirement. Nevertheless he was for several

more years a popular and respected figure in intellectual London society and on terms of friendship with Horne Tooke, Byron, Mackintosh and other prominent Whigs, dying in 1817.

It cannot be said that for a man of his gifts Curran left much in the way of a permanent mark upon his age—what advocate does? Yet the courage, devotion and ability which he brought to the defence of many deeply wronged compatriots must have remained a memory and an inspiration to many who carried on the struggle in the nineteenth century.

C.

Fault in the Formation of Contract in Roman Law and Scots Law. By Peter Stein, m.a., ll.b., ph.d., Professor of Jurisprudence in the University of Aberdeen. [Edinburgh: Oliver and Boyd. 1958. 216 pp. 20s. net.]

This is an interesting and important work, which appears at an opportune moment. It is not too much to say that the study of Roman Law in this country is today at a cross-roads. In many of our universities Roman Law is now taught only at an elementary level in the first year. So taught it serves as a useful introduction to legal concepts and enables a legal system to be seen as a whole at an early stage. But this is not the only purpose which the study of Roman Law can serve, nor is it a method calculated to produce new generations of Romanists, capable of making individual contributions to our knowledge of Roman Law, which are needed if we are not to slide into the regurgitation of second-hand knowledge. Professor Stein's work is to be welcomed therefore not merely for its intrinsic merits but for its timely reminder of how much the study of Roman Law still has to offer.

The greater part of the book—some four-fifths—is devoted to an examination of the effect in Roman Law of misrepresentation or non-disclosure in the formation of a contract. Basically there are two questions here: first, in what circumstances does the wronged party have a remedy; second, what is that remedy? To take the second first, Heldrich—the only previous author of a systematic study on this topic—argued that for classical law the remedy was delictual, usually by the *actio de dolo* and that references to the contractual actions were the work of the compilers. Professor Stein meets this contention head-on; for him the remedy was already in classical law the contractual action. Indeed he maintains this view even in the case of a void sale, where there is no contract. It is generally agreed that where a seller knowingly sells to an ignorant buyer *res sacra* or *religiosa* the price, if paid, could be recovered by *condictio* and that the buyer also has an action for his loss. But what action? There is no text in favour of the *actio de dolo* but D 11–7–8–1 appears to give an *actio in factum* and D 18–1–62–1 appears to give an *actio ex empto*. Since both texts betray signs of interference, controversy has naturally been rife. It would be unrealistic to imagine that Professor Stein's work will silence this, but he produces attractive arguments to suggest that D 11–7–8–1 did not originally deal with the relationship of buyer and seller, but rather with an action by the holder of the *jus inferendi* against the seller in respect of the violation of the grave.

Perhaps of wider interest is Professor Stein's analysis of the circumstances in which a remedy was available. Each contract is considered separately but though there is much of interest about the other contracts, sale is inevitably dominant. The three chapters in which the liability for misrepresentation and non-disclosure in sale are considered are the best in the book, and contain much provocative material. It is argued that the seller of land was liable by the end of the Republic for non-disclosure of legal defects of which he knew and the buyer was ignorant and that this continued to be the limit of his liability throughout the classical period. In the case of movables the jurists

used the *actio ex empto* to supplement the Aedilician Edict where the seller was fraudulent. But not all defects had to be disclosed. The tests offered by previous writers to delimit the defects to be disclosed come under heavy fire as too wide and imprecise. There was no tendency to protect the improvident buyer and the definition of the defects which must be disclosed was only slowly and casuistically worked out. In the case of misrepresentation, a distinction, attributed to Julian, is drawn between misrepresentation as to *materia*, which avoids the contract, and as to qualities which leads only to damages, which will usually be greater if the misrepresentation is fraudulent.

Professor Stein's treatment consists of the citation and critical consideration, often at great length, of the relevant texts. It must be confessed that this method does not always make for easy reading but the author's command both of the Digest texts and the secondary authorities is such as almost to disarm criticism. Sometimes, however, one is left not quite convinced. In D 19–1–13–5 Professor Stein reads "*villicus*" instead of the more usual "*Bellicus*"; if we assume the *villicus* to be free, this makes a more plausible story but a *villicus* would more usually be a slave and there is nothing inherently impossible in an outsider *Bellicus* being the buyer. Indeed as this appears to be a real case it would be natural for the buyer to be named. It would have been useful to have a fuller treatment of the manuscript sources. In treating D 18–1–35–8, Professor Daube's suggestion [in 73 L.Q.R. 379] is followed that this refers not to concealment of an unpleasant neighbour but to misdescription of the extent of the land, where this has been indicated by naming the neighbouring landowners. This is an attractive solution and harmonises much better with the other texts but it may perhaps be thought to leave "*quem emptor si audisset, empturus non esset*" almost devoid of meaning. While opinions as to who is a desirable neighbour are obviously highly variable, one would not normally expect fraudulent misdescription of the extent of the estate to be regarded as of no importance.

The latter portion of the book deals with the treatment of the same topics in Scots law. It is impossible for one unversed in this system to comment with any confidence on these two chapters but they reveal that Scots law, with its almost unique mixture of civilian and common law ideas, is a fertile field for the comparative lawyer and for the legal historian. Scots law on this matter was civilian in origin but since the latter half of the nineteenth century it has been much influenced by English ideas. It appears, however, that though Scots law has adopted the English rule of rescission for innocent misrepresentation, it has done so in the continental guise of *error in substantia*—with some resulting confusion. It is interesting to note, however, that, in this case at least, it was two Scots members of the House of Lords—Lords Watson and Dunedin—who seem to have played the most active part in introducing English ideas into Scots law.

The book is well produced and the reviewer has not noticed any significant misprints. One wonders, however, whether it is not somewhat optimistic for the author to assume a knowledge of French, German, Italian, and Ancient Greek in his readers. One of the great merits of this book for the insular reader is that it brings together much continental scholarship which was previously virtually inaccessible and it seems a pity to lose some of the value of this by leaving it untranslated. No doubt the ideal reader will be multilingual but there will be not a few who will be demoralised when as on p. 62 they are confronted with Ihering and Arangio-Ruiz speaking in their own words.

This book makes an important contribution to our knowledge of a difficult but interesting topic. It should be read by all who profess an interest in Roman Law.

M. P. Furmston.

THE LAW OF DEFAMATION. By RICHARD O'SULLIVAN, Q.C., and ROLAND BROWN. [Sweet & Maxwell Ltd. 1958. xvi and 188 pp. 25s. net.]

DEFAMATION PRACTICE. By COLIN DUNCAN and A. T. HOOLAHAN. [Sweet & Maxwell Ltd. Second edition. 1958. xx and 94 pp. 15s. net.]

THE authors of the first of these books state that it "is designed to provide a general outline of the subject and primarily as a textbook for students. In addition it will, we hope, be of use to anyone who feels moved to acquire, without overmuch research, a knowledge of the outlines of the law."

The text of the book contains a straightforward exposition of the law, which the student will undoubtedly find clear and helpful, though occasionally a more critical discussion might be welcome. Thus, in the explanation of the meaning of defamation, the various judicial attempts at definition are set out, though without any attempt to criticise or reconcile these different formulas, and there is no critical discussion of such controverted points as the relation of fair comment to privilege, or the various meanings of malice, the authors contenting themselves with asserting what they consider to be the true state of the law. Needless to say, the name of the editor of *Gatley* is sufficient guarantee of the accuracy of the book and the general soundness of its views, but it is felt that the book could have made a more substantial contribution at any rate for the better student, if there was more critical examination of basic principles.

As to the hope expressed of a wider public, the work hardly seems to be in a form or couched in a style calculated to excite the interest of the lay public, whatever reasons there may be for suspecting the existence of a potential market of this kind.

The second book is of a very different kind, and the fact that it has now appeared in a second edition is sufficient testimony of the need for such a work. The practice in defamation is notoriously technical and difficult and raises numerous problems for uninitiated practitioners, who include in this instance even seasoned lawyers unfamiliar with this particular field. The book is therefore addressed especially to counsel and solicitors concerned in the preparation of defamation cases, and being a guide to practice, it rightly avoids discussion of substantive law, except incidentally. The fact, as is well known, that the first-named author is one of the most experienced junior counsel at the Bar in defamation actions gives this work its special value and adds authority to the views expressed in it.

The utility of the book will be obvious to any practitioner at a glance, the only reservation being that it is perhaps a pity that the work is not somewhat longer. There is scope for a fuller discussion and more detailed guidance on many points than is to be found in the present work, for instance, on the pleading of fair comment and of malice, and of the particulars in support of these matters; on the new defence of unintentional defamation; on interim and interlocutory injunctions; on administering interrogatories; on payments into court; and on statements to be made in open court. All these are of course matters to be found treated in this book, but not quite as thoroughly as might have been hoped. Moreover, the lack of any precedents seems to be a very notable deficiency in a work of this kind, since practical examples of pleadings, particulars, interrogatories, statements to be read in open court, and similar precedents would often be far more illuminating as illustrations than any amount of exposition. Thus the authors are sometimes content with such assertions as "with a little experience counsel will soon learn how to draft these letters" (p. 4) (*i.e.*, the all-important letter before action); or "experience will soon show what facts it is desirable to set out" (p. 20) (in the statement of claim); followed by points which should be borne in mind by the draftsman. But it is just experience that *ex hypothesi* the reader will usually lack, and an

example or two would here be an effective way of illustrating how to set about such tasks as these. Again it is a little frustrating for the tyro to be told somewhat loftily that "counsel who are familiar with the practice in defamation cases are very often able to agree between themselves the form of interrogatories, outside court, so well settled are the general rules in these matters" (p. 65). Nothing can be a complete substitute for personal experience, but a few draft specimens can, in this sort of matter, provide the next best thing.

The book is confined exclusively to pre-trial procedure, and in regard to this, as one might anticipate, approaches the subject primarily from the point of view of counsel, which is a pity, as much may depend on the skilful handling of the case from the solicitor's end. Also a place might well have been found for a discussion of practical points in connection with the trial itself.

In short, this is a book which is most useful as far as it goes, but is still capable of further development, without injury to the character of the work as a whole.

DENNIS LLOYD.

CASES ON THE LAW OF TORTS. By CECIL A. WRIGHT, Q.C. Second edition. [London: Butterworth & Co. (Publishers), Ltd. 1958. xix and 952 pp. (with index). 55s. net.]

IT is a pleasure to welcome a second edition of Dean Wright's Casebook on the law of Torts. Although it may be true to say that Lord Eldon's view that "It is better that the law should be certain than that every judge should speculate upon improvements in it" may, to some extent, apply to English law teaching and teachers, it is evident that the present casebook, which is the work of a very distinguished scholar, has found, in the five years since the original version appeared, a very receptive reading public and has achieved considerable popularity in this country. This is primarily due to the inherent value of this book and its ability to provoke and stimulate thought. The present reviewer, as a teacher of tort, may often have found himself in disagreement with a good deal of the views expressed in this book, but he must nevertheless testify that at no time has he looked at the book without some profit to himself, and through him, it is hoped, to his students. But it may also be, and this must be understood in no disparaging sense, that the law of tort is peculiarly suitable for this sort of treatment, for tort, still in its formative years, is essentially a subject which lends itself admirably to the all-questioning outlook of the casebook technique.

Perhaps it would be fair to say that the present reviewer has not been able to overcome some of the misgivings which he had felt with regard to the original version of this book ((1955) 18 M.L.R., p. 251); and it would be idle to repeat these misgivings here, for the general character and structure of the book have essentially remained those of the earlier version. But an example may be revealing of the difference in outlook. Thus, Dean Wright comments upon the Occupiers' Liability Report as follows: "While recommending wide-sweeping legislative changes in much of the law as stated in the cases to be examined in this chapter, a more fundamental question, for jurisdictions outside England in particular, is whether these suggested changes are necessary or wise. It may well be that the means of clarification are already in the courts' hands if they choose to use them. The problem, of course, is what to extract from the cases: the shadow of categories or the substance of principle. Students may or may not agree with the editor's view that many recent English decisions exhibit the worst characteristics of a mechanical jurisprudence," etc. (p. 549). Although tort is admittedly in a state of flux, it may be that, in his pursuit of principles and a creative attitude of the courts towards the judicial process, the learned author gives less weight, at least as far as English law is

concerned, to what appears as "mechanical jurisprudence" but may be, in fact, nothing more than the expression of one of Cardozo's "fundamental social interests that law shall be uniform."

The book contains a considerable number of new decisions in addition to, or in the place of, the authorities of the earlier version. And one of the most valuable features of the book for the English lawyer is the large number of reported decisions from other jurisdictions, especially in the greatly expanded chapter on Negligence. We note with pleasure some newcomers, *e.g.*, *King* v. *Phillips*, *Behrens* v. *Bertram Mills Circus*, *Carmarthenshire County Council* v. *Lewis*, *Car & General Insurance Corp., Ltd.* v. *Seymour and Maloney*, a Canadian case of driving under the influence, and many others. But readers will regret the absence of *Bonsor* v. *Musicians' Union* or the Occupiers' Liability Act.

A. G. Chloros.

Le Trespass. Étude de droit anglais. Par Jaques Morier-Genoug, Licencié en Droit. (Thèse de licence et de doctorat présentee à la faculté de droit de l'Université de Lausanne.) [Lausanne: Imprimerie Henri Jaunin S.A. 1958. 125 pp. (including index). No price stated.]

This doctoral thesis presented to the Faculty of Law of the University of Lausanne is, primarily, a study of those aspects of modern common law which can be traced to the notion of trespass. After a summary account of the historical background, the learned author analyses the nature of trespass and its relation to liability in general. This is followed by an account of the different forms of liability to which trespass has given rise such as battery, assault, false imprisonment, trespass to goods and trespass to land. He then turns to negligence in a brief chapter (Chap. III). The rest of the book is mostly devoted to the liability of occupiers to visitors and account is here taken of the changes brought about by the Occupiers' Liability Act which is also included in an appendix.

The learned author shows himself familiar with all aspects of substantive law and his study and reading have obviously been extensive. The most striking feature of the book is the balance and moderation displayed in the treatment of the ways of English law, a task inherently difficult for a person trained in a civil law system. For instance, in the concluding chapter the author discusses the competing claims of trespass and negligence in the field of civil liability and here he reveals an insight into the problem as seen by the common law, but also within a broad background which transcends any single legal system. Generally his comments are thoughtful and his general exposition lucid and sound.

On the other hand, the scope of the thesis precluded the learned author from touching more than the surface of the law. The present reviewer would have felt happier if the book had been called an introduction to trespass rather than a thesis. The subjects are presented in a textbook fashion and indeed, judging from the cases quoted, there is evidence to show that the author allowed himself to be influenced too much by the standard textbooks. Thus, while reading the book, one can often guess the case which is to be quoted as an illustration. And it is indeed an odd reason for excluding any attempt at comparison that trespass is a peculiarly English institution (p. 9). In fact, the value of the very few comparative comments made shows how much we lose by the absence of comparison. And, it may be asked, is it worth devoting a large part of a book published in 1958 to the duties, in great detail, of occupiers to visitors?—particularly when the Occupiers' Liability Act is not properly integrated in the text. Further, how deep can the author go when he devotes only four and a half pages to the history of trespass? Although

the author is interested in a theory of liability in general, he dismisses the controversy between tort and torts in a footnote (p. 20, n. 2). Why does battery receive such a summary treatment? (pp. 33–34). Can the author properly evade an account of possession by referring us in a footnote to Pollock & Wright? (p. 52, n. 190). Is it really true that crimes are divided according to gravity into "offences" (*sic*) and "misdemeanours" (pp. 38–39), or that negligence has been a tort since the nineteenth century? (p. 57 but see for a sounder view at p. 59).

As an introduction to a common law subject this work has undeniable merits, but it could not be called a profound book. Nevertheless, the interest taken by civilians in the common law at postgraduate level is a new and most encouraging sign for those of us who have the prospects for comparative law at heart.

A. G. Chloros.

Negligence in Delict. By the late J. C. Macintosh, b.a., ll.b., Advocate of the Supreme Court of South Africa, and C. Norman-Scoble, b.a., ll.b., Advocate of the Supreme Court of South Africa. Fourth edition. [Cape Town; Wynberg; Johannesburg: Juta & Co., Ltd. 1958. xliii and 438 pp. (including index). £6 net.]

It is easy to poke fun at practitioners' works and Macintosh and Scoble on *Negligence in Delict* is no exception. As regards arrangement, one could instance p. 164, where the statement "The question of removal of support as between buildings appertains not to negligence but to proprietary rights" appears in a section headed "Slippery Floors." For the treatment of decisions on the facts as stating rules of law one can point to p. 313, which says that whereas an unlighted wagon should be reasonably visible to a motorist driving at night, it is not culpable to fail to see a tram-rail grinder (*Durban Corporation* v. *Milne*, 1939 N.P.D. 488).

But this work does contain a valuable collection of negligence cases decided in South African courts, together with many references to English and American decisions; often the cases are unreported elsewhere. Another valuable feature is that the text of the relevant sections of provincial motoring Ordinances is usually given in full. On the question whether the defence of *volenti* amounts to a denial of duty to the plaintiff, the author sensibly suggests a distinction between cases where the risk is necessarily inherent in the undertaking and where it arises solely from the defendant's lack of precaution. His criticism of the decision in *Zulu* v. *Minister of Justice*, 1956 (2) S.A. 128 (N), which denied a remedy to a wife married by native customary union whose husband had been killed by the defendant's negligence, will be widely supported. Apart from a few slips, the editing is competent. The only serious criticism is that full effect has not been given to the Apportionment of Damages Act, 1956, which, with its express abrogation of the last opportunity rule, has made obsolete most of the material in Chapter XXIII and a good deal elsewhere, *e.g.*, the statement at p. 351 that the plaintiff's negligence in *Pretorius* v. *African Gate and Fence Works*, 1939 A.D. 569 "ceased" prior to the collision. But South African writers are not the only ones to have difficulty in adjusting their statement of the law to take account of apportionment statutes.

A. M. Honoré.